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UNITED STATES CIRCUIT COURTS OF APPEALS REPORTS

July 1

CONTAINING THE

CASES DETERMINED IN ALL THE CIRCUITS

FROM THE ORGANIZATION OF THE COURTS

FULLY REPORTED WITH ANNOTATIONS

WITH TABLES OF C. C. A. CASES PUBLISHED IN VOLS. 41, 42, AND 49, UNITED STATES APPEALS REPORTS

ALSO, TABLE OF CASES IN THE UNITED STATES CIRCUIT COURTS OF APPEALS WHICH HAVE BEEN PASSED UPON BY THE SUPREME COURT OF THE UNITED STATES, AND TABLE OF CASES IN THE UNITED STATES CIRCUIT COURTS OF APPEALS IN WHICH REHEARINGS HAVE BEEN GRANTED OR DENIED

BY MEMBERS OF THE
EDITORIAL STAFF OF THE NATIONAL REPORTER SYSTEM.

VOLUME 31

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PUBLISHER'S PREFACE.

In this volume we again republish, in addition to the regular matter, the Act of Congress establishing the Circuit Courts of Appeals, together with additions and amendments thereto, annotated with all pertinent decisions down to the present time; and also the compiled Court Rules for all the circuits, with amendments and annotations.

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St. Paul, January, 1899.

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ACT ESTABLISHING

THE

CIRCUIT COURTS OF APPEALS

AND

AMENDMENTS THERETO.

WITH ANNOTATIONS.

[The annotations will be found at the end of each section.]

ORIGINAL ACT.

An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes.

Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that there shall be appointed by the president of the United States, by and with the advice and consent of the senate, in each circuit, an additional circuit judge, who shall have the same qualifications, and shall have the same power and jurisdiction therein, that the circuit judges of the United States, within their respective circuits, now have under existing laws, and who shall be entitled to the same compensation as the circuit judges of the United States in their respective circuits now have.

SEC. 2. That there is hereby created[1] in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with appellate jurisdiction, as is hereinafter limited and established. Such court shall prescribe the form and style of its seal, and the form of writs and other process and procedure, as may be conformable to the exercise of its jurisdiction as shall be conferred by law. It shall have the appointment of the marshal of the court, with the same duties and powers, under the regulations of the court, as are now provided for the marshal of the supreme court of the United States, so far as the same may be applicable. The court shall also appoint a clerk, who shall perform and exer-

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cise the same duties and powers, in regard to all matters within its jurisdiction, as are now exercised and performed by the clerk of the supreme court of the United States, so far as the same may be applicable. The salary of the marshal of the court shall be twenty-five hundred dollars a year, and the salary of the clerk of the court shall be three thousand dollars a year, to be paid in equal proportions quarterly. The costs and fees in the supreme court now provided for by law shall be costs and fees in the circuit courts of appeals;[2] and the same shall be expended, accounted for, and paid for, and paid over to the treasury department of the United States, in the same manner as is provided in respect of the costs and fees in the supreme court.

The court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law.[3]

[1] The act went into immediate operation, so as to permit a review thereunder of a judgment entered after its date on a verdict rendered prior thereto. In re Claasen, 140 U. S. 200, 11 Sup. Ct. 735; McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. 118; Mason v. Mining Co., 153 U. S. 361, 14 Sup. Ct. 847; Railroad Co. v. Bennett (6th Circuit) 1 C. C. A. 392, 49 Fed. 598; Railroad Co. v. Amato (2d Circuit) 1 C. C. A. 468, 49 Fed. 881; Railroad Co. v. Andrews (6th Circuit) 1 C. C. A. 636, 50 Fed. 728. But the act is not retroactive, so as to permit a review by the circuit court of appeals of a judgment rendered before its passage. U. S. v. National Exch. Bank (7th Circuit) 3 C. C. A. 390, 53 Fed. 9. In Courtney v. President, etc. (8th Circuit) 1 C. C. A. 249, 49 Fed. 309, it was held that where, in foreclosure proceedings, a decree of sale was rendered in the circuit court before the date of the act, and, after the date of the act, a further decree was rendered on a cross bill setting up a mechanic's lien, an appeal would lie to the circuit court of appeals from the latter decree, but not from the former.

Where a conviction of an infamous crime was had before the passage of the act, the granting of a writ of error by the supreme court because the final judgment was rendered subsequently to the act taking effect cannot create a right to a bill of exceptions which did not exist under the law at the time of the conviction. In re Claasen, 140 U. S. 200, 11 Sup. Ct. 737. A case settled by the circuit court for the hearing of a motion for a new trial and in arrest of judgment, in such a case, is no part of the record on error to the supreme court; and errors in law therein set forth, though in the form of a bill of exceptions, cannot be considered by the supreme court. Claasen v. U. S., 142 U. S. 140, 12 Sup. Ct. 169. In such case neither the assignment of errors nor the plea of in nullo est erratum can give the supreme court jurisdiction of errors not appearing on the face of the record. Id.

[2] Under this provision, an attorney's fee of $20 is taxable against plaintiff in error, upon affirmance of the judgment with costs by the circuit court of appeals, as such is the uniform practice of the supreme court under a rule identical with that of the circuit court of appeals. Railroad Co. v. McDonald (8th Circuit) 9 C. C. A. 129, 60 Fed. 523.

This provision was amended by the act approved February 19, 1897, on page xlvi., infra.

[3] Under this clause, the court has power to promulgate rules in relation to the introduction of additional evidence in admiralty appeals. The Philadelphian (1st Circuit) 9 C. C. A. 54, 60 Fed. 423.

SEC. 3. That the chief justice and the associate justices of the supreme court assigned to each circuit, and the circuit judges within each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits in the manner hereinafter provided. In case the chief

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justice or an associate justice of the supreme court should attend at any session of the circuit court of appeals, he shall preside, and the circuit judges in attendance upon the court, in the absence of the chief justice or associate justice of the supreme court, shall preside in the order of the seniority of their respective commissions.

In case the full court at any time shall not be made up by the attendance of the chief justice or an associate justice of the supreme court and circuit judges, one or more district judges within the circuit shall be competent to sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court: *provided*, that no justice or judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals. A term shall be held annually by the circuit court of appeals in the several judicial circuits at the following places: In the first circuit, in the city of Boston; in the second circuit, in the city of New York; in the third circuit, in the city of Philadelphia; in the fourth circuit, in the city of Richmond; in the fifth circuit, in the city of New Orleans; in the sixth circuit, in the city of Cincinnati; in the seventh circuit, in the city of Chicago; in the eighth circuit, in the city of St. Louis; in the ninth circuit, in the city of San Francisco; and in such other places in each of the above circuits as said court may from time to time designate. The first terms of said courts shall be held on the second Monday in January, eighteen hundred and ninety-one, and thereafter at such times as may be fixed by said courts.*

* See the joint resolution passed on the same day with the act, page xl., infra.

SEC. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals, by writ of error or otherwise, from said district courts shall only be subject to review in the supreme court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the supreme court of the United States or in the circuit courts of appeals hereby established, according to the provisions of this act regulating the same.[4]

[4] The entire federal appellate jurisdiction is distributed, by the provisions of this act, between the supreme court and the circuit court of appeals. McLish v. Roff, 141 U. S. 667, 12 Sup. Ct. 120; Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517; Badaracco v. Cerf (8th Circuit) 3 C. C. A. 491, 53 Fed. 169; Webb v. York (8th Circuit) 21 C. C. A. 65, 74 Fed. 753.

This section does not limit the power of the supreme court under Rev. St. §§ 716, 1000, 1007, to issue a writ of supersedeas upon a writ of error in a criminal case. In re Claasen, 140 U. S. 200, 11 Sup. Ct. 735.

The appellate jurisdiction of the circuit courts in habeas corpus cases, under Rev. St. U. S. § 763, was devested by this act, and conferred on the circuit courts of appeals. Webb v. York (8th Circuit) 21 C. C. A. 65, 74 Fed. 753.

This act by implication repealed Rev. St. §§ 651, 697, in relation to certificates of division of opinion in criminal cases by the judges of the circuit court. U. S. v. Hewecker, 17 Sup. Ct. 18, 164 U. S. 46, 41 L. Ed. 345.

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SEC. 5. That appeals or writs of error† may be taken from the district courts or from the existing circuit courts direct to the supreme court in the following cases:[5]

In any case in which the jurisdiction of the court is in issue; ** in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision.[6]

From the final sentences and decrees in prize causes.

In cases of conviction of a capital or otherwise infamous crime.[7]

In any case that involves the construction or application of the constitution of the United States.[8]

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.[9]

In any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States.[10]

Nothing in this act shall affect the jurisdiction of the supreme court in cases appealed from the highest court of a state, nor the construction of the statute providing for review of such cases.

† The provision authorizing appeals or writs of error from the district and circuit courts, in cases of conviction of an infamous crime, does not authorize the review of a judgment of conviction in such a case by appeal, instead of by writ of error. Bucklin v. U. S., 16 Sup. Ct. 182, 159 U. S. 680.

[5] The supreme court has no direct appellate jurisdiction over the circuit and district courts, except in the six classes of cases here enumerated, unless the cause was pending at the date of the act, and the appeal or writ of error was allowed before July 1, 1891, as provided by the joint resolution passed on the same day with the act. Bank v. Peters, 144 U. S. 570, 12 Sup. Ct. 767; Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co., 159 U. S. 698, 16 Sup. Ct. 189; Webster v. Daly, 163 U. S. 155, 16 Sup. Ct. 961.

The action of a circuit court of appeals in refusing to allow a case to be docketed, on the ground that it should have been taken to the supreme court, cannot be reviewed by the supreme court on a writ of error to the circuit court. Lutcher v. U. S., 157 U. S. 427, 15 Sup. Ct. 718.

Appeals from decrees of the circuit courts on habeas corpus cannot be taken directly to the supreme court except in the classes of cases enumerated in this section. Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517; Horner v. U. S., 143 U. S. 570, 12 Sup. Ct. 522; Cross v. Burke, 146 U. S. 82, 13 Sup. Ct. 24.

An appeal will not lie from the circuit court to the supreme court in a copyright case (which may be appealed to the circuit court of appeals, under section 6) merely because the circuit court, by the form of its entry, has made the decree of the circuit court of appeals, affirming a previous decree of the circuit court, its own decree. Webster v. Daly, 163 U. S. 155, 16 Sup. Ct. 961.

An appeal or writ of error cannot be taken in the classes of cases here enumerated before final judgment. McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. 118.

On appeal or writ of error taken direct to the supreme court the entire controversy goes to that court, except in the case where the jurisdiction of the court below is in issue. Horner v. U. S., 143 U. S. 570, 12 Sup. Ct. 522.

Rev. St. D. C. § 846, giving the same right of appeal from the supreme court of the District of Columbia as is "provided by law" for appeals from circuit courts, does not render applicable to such court the provisions of the above act, passed subsequent thereto. Cross v. Burke, 146 U. S. 82, 13 Sup. Ct. 22; In re Heath, 144 U. S. 92, 12 Sup. Ct. 615.

When it is doubtful whether an appeal will lie directly from the circuit to the supreme court, a party does not waive his appeal to the supreme court

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by taking at the same time an appeal to the circuit court of appeals. Pullman's Palace-Car Co. v. Central Transp. Co., 18 Sup. Ct. 808, 171 U. S. 138.

See the act approved July 8, 1898, page xlvii., infra.

** An appeal or writ of error under this subdivision is not allowable before the cause has proceeded to final judgment. McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. 120; Railway Co. v. Roberts, 141 U. S. 690, 12 Sup. Ct. 123.

A party cannot at the same time appeal to the supreme court on the question of jurisdiction and to the circuit court of appeals on the merits. McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. 120. But one party cannot be deprived of his right to appeal to the circuit court of appeals on the merits by his opponent's appealing to the supreme court on the question of jurisdiction; and in case of such separate appeals the cause will be continued in the circuit court of appeals to await the decision of the supreme court upon the question of jurisdiction. Railroad Co. v. Glaspell (8th Circuit) 1 C. C. A. 327, 49 Fed. 482.

In McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. 118, the court say: "The party against whom a final judgment is rendered must elect whether he will take his writ of error or appeal to the supreme court upon the question of jurisdiction alone, or to the circuit court of appeals upon the whole case. If the latter, then the circuit court of appeals may, if it deem proper, certify the question of jurisdiction to the supreme court." And this was followed in Barling v. Bank (9th Circuit) 1 C. C. A. 510, 50 Fed. 260; Maynard v. Hecht, 151 U. S. 324, 14 Sup. Ct. 353; Refining Co. v. Johnson (5th Circuit) 9 C. C. A. 110, 60 Fed. 503.

When the record on an appeal from the circuit court to the circuit court of appeals presents both a question as to the jurisdiction of the former court and other questions which, if the circuit court is found to have had jurisdiction, must be disposed of, the court of appeals has jurisdiction, and must consider the question of the jurisdiction of the circuit court, though that court has dismissed the case for want of jurisdiction. Coler v. Grainger Co. (6th Circuit) 20 C. C. A. 267, 74 Fed. 16.

When a final judgment or decision has been rendered in a district or circuit court, involving both questions of jurisdiction and other questions, the party against whom it is rendered may elect to take his writ of error to the supreme court on the question of jurisdiction alone, or to the circuit court of appeals on the whole case. When he chooses the latter course, the circuit court of appeals has jurisdiction to determine the question of the jurisdiction of the court below, as well as all other questions. Rust v. Waterworks Co. (8th Circuit) 17 C. C. A. 16, 70 Fed. 129.

The circuit court of appeals has jurisdiction over questions touching the jurisdiction of the court below, unless the issue has been made in the court below, and certified to the supreme court, as directed by the second clause of section 5. This court, therefore, has jurisdiction on appeal from a decision on habeas corpus to pass on the jurisdiction of the circuit court, even though such jurisdiction is challenged on constitutional grounds. King v. McLean Asylum (1st Circuit) 12 C. C. A. 139, 64 Fed. 325.

Where the jurisdiction of the circuit court is in issue, and the jurisdiction is sustained, but there is a judgment for defendant on the merits, plaintiff must appeal to the circuit court of appeals, which may certify the question of jurisdiction if it arises in that court. If, in such case, there is a judgment for plaintiff on the merits, defendant may elect either to have the jurisdictional question certified directly to the supreme court, or to carry the whole case to the circuit court of appeals, which may certify the jurisdictional question. If the judgment is for plaintiff, but he nevertheless has grounds of complaint, he may take the case to the circuit court of appeals on the merits by cross appeal or writ of error, if defendant has taken the case there, or independently, if defendant has had the jurisdictional question certified to the supreme court; in which case the circuit court of appeals will suspend a decision on the merits until the jurisdictional question is determined. U. S. v. Jahn, 155 U. S. 109, 15 Sup. Ct. 39.

The fact that a writ of error has been sued out from the supreme court to review a judgment of the circuit court for want of jurisdiction does not prevent the circuit court of appeals from entertaining a writ of error to review an

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order, made after the judgment was entered, which denies a new trial claimed under a state statute, which gives a defeated party a right to a second trial in actions of ejectment. Shreve v. Cheesman (8th Circuit) 16 C. C. A. 413, 69 Fed. 785.

In Manufacturing Co. v. Barber (7th Circuit) 9 C. C. A. 79, 60 Fed. 465, on error to review a judgment dismissing an action on demurrer for want of jurisdiction, it was held, quoting McLish v. Roff, that the circuit court of appeals has no jurisdiction of an appeal or writ of error when the jurisdiction of the court below is the only question for review, but it must be taken direct to the supreme court. And see, to the same effect, Cabot v. McMaster (7th Circuit) 13 C. C. A. 39, 65 Fed. 533; The Alliance (9th Circuit) 17 C. C. A. 124, 70 Fed. 273; U. S. v. Sutton (9th Circuit) 2 C. C. A. 115, 47 Fed. 129.

However, in Crabtree v. Madden (8th Circuit) 4 C. C. A. 408, 54 Fed. 426, the court, quoting the same case, say: "When a party against whom a final judgment has been rendered in a district or circuit court of the United States elects to take his writ of error to a circuit court of appeals upon the whole case, that court has jurisdiction to determine it, whether the question of the jurisdiction of the court below is the sole question, or but one of many questions in issue under the writ." But in this case it will be noticed that the question of jurisdiction was not the sole question in issue.

In a case in which a final decree would be appealable to the circuit court of appeals under Act March 3, 1891, §§ 5, 6, an appeal will lie to that court, under section 7, from an interlocutory decree granting an injunction, even though such appeal raises only the question of the lower court's jurisdiction. Lake Nat. Bank v. Wolfeborough Sav. Bank, 78 Fed. 517, 24 C. C. A. 195; In re Tampa Suburban R. Co., 18 Sup. Ct. 177, 168 U. S. 583.

In a suit in which an appeal would lie to the circuit court of appeals from a final decree, where an appeal is taken from an order granting a temporary injunction and appointing a receiver, and the jurisdiction of the circuit court is also involved, such appeal carries up the entire order, and the case may, on occasion, be considered and decided on the merits. In re Tampa Suburban R. Co., 18 Sup. Ct. 177, 168 U. S. 583.

On appeal from an order granting a preliminary injunction in aid of the appointment of a receiver, where the question as to the jurisdiction of the circuit court was of a grave and vital character, *held*, that the circuit court of appeals would not then determine it, but would decide the question of the propriety of the injunction on its merits, and leave the jurisdictional question until after final decree below, so that the parties, if they so desired, might take it direct to the supreme court. Carson v. Combe (5th Circuit) 86 Fed. 202, 29 C. C. A. 660.

Where the whole case is taken to the circuit court of appeals, that court will, of its own motion, notice a defect of jurisdiction of the court below, and make disposition of the case accordingly. Robinson v. City of Wilmington (4th Circuit) 9 C. C. A. 84, 60 Fed. 469; Refining Co. v. Johnson (5th Circuit) 9 C. C. A. 110, 60 Fed. 503.

But an order dissolving a temporary injunction, which under the circumstances is harmless, will not be reviewed in order to decide a question of jurisdiction. Lake Street El. R. Co. v. Farmers' Loan & Trust Co. (7th Circuit) 23 C. C. A. 448, 77 Fed. 769.

The provision for the certification to the supreme court of the question of jurisdiction of the circuit court, when that is in issue, does not apply when the only question is whether the case was properly brought in equity or at law. Smith v. McKay, 16 S. Ct. 490, 161 U. S. 355; World's Columbian Exposition v. U. S. (7th Circuit) 6 C. C. A. 58, 56 Fed. 654; U. S. v. Swan (6th Circuit) 13 C. C. A. 77, 65 Fed. 647.

An assignment of error that the circuit court erred in dismissing the action as against any of the parties named in the process, though they had not been served, and, by reason of nonresidence, could not be, and an objection that the order of dismissal was not a final order, did not involve solely a question of the jurisdiction of the circuit court, and hence the circuit court of appeals had jurisdiction of the writ of error. Beck & Pauli Lith. Co. v. Wacker & Birk B. & M. Co. (7th Circuit) 76 Fed. 10, 22 C. C. A. 11.

In a suit in admiralty, where the district court has jurisdiction of the par-

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ties and the res, but dismisses the libel on the ground that the cause of action is barred by lapse of time, the question involved, on an appeal from such decree, is not one concerning the jurisdiction of the district court, so as to prevent the circuit court of appeals from taking jurisdiction. Laidlaw v. Navigation Co. (9th Circuit) 26 C. C. A. 665, 81 Fed. 876.

But the circuit court of appeals has no jurisdiction of an appeal in proceedings in admiralty for limitation of liability, when the only question for review is whether the district court had jurisdiction, after final disposition of the questions of limitation, to enter a decree in personam against the owners of the vessel for damages suffered by some of the interveners. The Annie Faxon (9th Circuit) 31 C. C. A. 325, 87 Fed. 961.

The question whether a district court acquired jurisdiction over the defendant by valid service is one of jurisdiction, and a judgment in which it is involved is reviewable by writ of error directly from the supreme court. Shepard v. Adams, 18 Sup. Ct. 214, 168 U. S. 618.

After removal of a cause to a federal court, the plaintiff moved to remand because the removal papers were not filed in proper time. His motion was overruled, but at the trial he still insisted that the court was without jurisdiction, and, declining to prosecute the action therein, a final judgment was rendered against him. *Held*, that the question of jurisdiction thus raised was one which might be certified directly to the supreme court. Judgment (C. C. 1895) 65 Fed. 129, affirmed. Powers v. Railway Co., 18 Sup. Ct. 264, 169 U. S. 92.

When an appeal or writ of error is taken direct to the supreme court, where the jurisdiction of the court alone is in issue, a certificate from the court below of the question of jurisdiction to be decided is an absolute prerequisite for the exercise of jurisdiction by the supreme court. Maynard v. Hecht, 151 U. S. 324, 14 Sup. Ct. 353; Moran v. Hagerman, 151 U. S. 329, 14 Sup. Ct. 354. See, also, Carey v. Railroad Co., 150 U. S. 170, 14 Sup. Ct. 63; Colvin v. City of Jacksonville, 157 U. S. 368, 15 Sup. Ct. 634; Lutcher v. U. S., 157 U. S. 427, 15 Sup. Ct. 718; Ansbro v. U. S., 159 U. S. 695, 16 Sup. Ct. 187; Davis v. Geissler, 162 U. S. 290, 16 Sup. Ct. 796; Reed v. Stanly (C. C.) 89 Fed. 430.

A certificate setting out the whole case, and propounding a question which would require an analysis of all the facts, held not to be in compliance with the rules applicable thereto. Graver v. Faurot, 162 U. S. 435, 16 Sup. Ct. 799.

An order directing the filing of an assignment of errors, which alleges error of the court below in taking jurisdiction of the cause for reasons therein separately stated, is not equivalent to the certificate of jurisdictional questions required by the act. The Bayonne, 16 Sup. Ct. 185, 159 U. S. 687.

A prayer for the allowance of an appeal from the district to the supreme court stated that the appeal was "upon the ground that this court was without jurisdiction to make said decree," but specified no question of jurisdiction, and asked that a transcript of the record, proceedings, and papers upon which said final decree was made should be sent up, as if the appeal were on the whole case. The judge entered thereon, "Appeal allowed." *Held*, that this was entirely insufficient to answer the purposes of a certificate of jurisdictional questions. In re Lehigh Min. & Manuf'g Co., 15 Sup. Ct. 375, 156 U. S. 222, and Shields v. Coleman, 15 Sup. Ct. 570, 157 U. S. 168, distinguished. The Bayonne, 16 Sup. Ct. 185, 159 U. S. 687.

The fact that, in an equity proceeding in the circuit court, a demurrer to the petition on the ground that a proper and final decree had been made, adjudicating all the issues in the cause, and that the court had no power or jurisdiction to grant the petitioners relief, was sustained, does not so clearly show that the jurisdiction of the circuit court was in issue as to dispense with the necessity of a certificate to that effect to the supreme court. Van Wagenen v. Sewall, 16 Sup. Ct. 370, 160 U. S. 369.

Where the allowance of the writ of error is general, and not expressly limited to the question of jurisdiction of the court, and the petition for the writ, after mentioning all the proceedings in detail, asks for a review of all the "rulings, judgments, and orders" of the court "upon the question of jurisdiction raised in said exceptions, pleas, and demurrers, and the other papers on file in this cause," without defining or indicating any specific question of

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jurisdiction, there is no such full, clear, and separate statement of a definite question of jurisdiction as will supply the want of a formal certificate. Chappell v. U. S., 16 Sup. Ct. 397, 160 U. S. 499.

The word "certify" need not be formally used, but there must be a plain declaration that the single matter sent up is a question of jurisdiction, and this question must be clearly and fully stated. Shields v. Coleman, 157 U. S. 168, 15 Sup. Ct. 570. See, also, The Bayonne, 159 U. S. 687, 16 Sup. Ct. 185.

Where the record shows that the only matter tried and decided in the circuit court was a demurrer to a plea of the jurisdiction, and the petition on which the writ of error was allowed asked only for the review of the judgment on the jurisdictional question, this amounts to a sufficient certification of the jurisdictional question. Improvement Co. v. Gibney, 160 U. S. 217, 16 Sup. Ct. 272.

The record disclosed that defendants appealed on the express ground that the circuit court "erred in taking jurisdiction, and in not dismissing the bill for want of jurisdiction, and prayed that their appeal be allowed, and the question of jurisdiction be certified to the supreme court, and that said appeal was allowed." The certificate further stated that there was sent a true copy of so much of the record as was necessary to determine the question of jurisdiction, and, "as part of the record so certified," was "the opinion of the court below, in accordance with which the motion to dismiss for want of jurisdiction was denied." *Held*, that it appeared that the appeal was granted solely on the question of jurisdiction, and that hence an express certificate to that effect was not necessary to authorize a review. Smith v. McKay, 16 Sup. Ct. 490, 161 U. S. 355.

The certificate of the jurisdictional question must be granted during the term at which the judgment or decree was entered. Colvin v. City of Jacksonville, 158 U. S. 456, 15 Sup. Ct. 866; The Bayonne, 159 U. S. 687, 16 Sup. Ct. 185.

In a district court which has monthly terms, a final decree was entered December 21st, and an appeal allowed December 31st. January 17th an assignment of error, questioning the jurisdiction of the court, was directed to be filed nunc pro tunc as of December 31st, and it was claimed that such assignment was equivalent to a certificate of the jurisdictional questions involved. *Held* that, in the absence of anything in the record, prior to the expiration of the December term, to indicate any attempt to file a certificate during that term, the case was not within the rule permitting amendments nunc pro tunc, and the assignment could not be considered as a certificate. The Bayonne, 16 Sup. Ct. 185, 159 U. S. 687.

An appeal direct to the supreme court in a revenue case in which the question of jurisdiction is certified, though general in form, does not bring up anything more than the question of jurisdiction. Passavant v. U. S., 148 U. S. 214, 13 Sup. Ct. 572.

In a suit where the jurisdiction of the circuit court depends on diverse citizenship, the only question that can be considered by the supreme court on writ of error to the circuit court is whether or not the circuit court had jurisdiction. McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. 118; Schunk v. Moline, Milburn & Stoddart Co., 147 U. S. 500, 13 Sup. Ct. 416.

[7] On conviction of an infamous crime, a writ of error cannot be taken to the circuit court of appeals. The appellate jurisdiction of the supreme court is exclusive. U. S. v. Sutton (9th Circuit) 2 C. C. A. 115, 47 Fed. 129; Stokes v. U. S. (5th Circuit) 9 C. C. A. 152, 60 Fed. 597.

A crime punishable by imprisonment in a state penitentiary is an "infamous crime," though the accused is not sentenced to hard labor. In re Claasen, 140 U. S. 200, 11 Sup. Ct. 735. The test is whether the crime is one for which the statute authorizes the court to award an infamous punishment, not whether the punishment actually awarded is an infamous one. Id.; Stokes v. U. S. (5th Circuit) 9 C. C. A. 152, 60 Fed. 597.

Adultery is an "infamous crime." U. S. v. Sutton (9th Circuit) 2 C. C. A. 115, 47 Fed. 129. The use of the mails for promoting a scheme to defraud (Rev. St. § 5480), being punishable by imprisonment in a state penitentiary not exceeding 18 months, is an "infamous crime." Stokes v. U. S. (5th Circuit) 9 C. C. A. 152, 60 Fed. 597.

The violation of Act Cong. June 29, 1888 (25 Stat. 209, c. 496), prohibiting obstructive and injurious deposits in New York Harbor, not being punishable

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by imprisonment for over one year, or at hard labor, or by imprisonment in a penitentiary, is not an infamous crime. Ansbro v. U. S., 16 Sup. Ct. 187, 159 U. S. 695.

This provision does not confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of defendant. U. S. v. Sanges, 144 U. S. 310, 12 Sup. Ct. 609.

A justice of the supreme court may issue a supersedeas on allowing a writ of error to a circuit court in case of a conviction for an infamous crime. In re Claasen, 140 U. S. 200, 11 Sup. Ct. 735.

The previous statutory provisions giving the supreme court power, upon reversing a conviction, to remand, with directions to render proper judgment, apply to criminal cases in which jurisdiction is conferred by this act. Ballew v. U. S., 16 Sup. Ct. 263, 160 U. S. 187.

The provision authorizing appeals or writs of error from the district and circuit courts in cases of conviction of an infamous crime does not authorize the review of a judgment of conviction in such a case by appeal instead of by writ of error. Bucklin v. U. S., 16 Sup. Ct. 182, 159 U. S. 680.

Rev. St. §§ 651, 697, in relation to certificates of division of opinion in criminal cases by the judges of the circuit court, were repealed by this act. U. S. v. Hewecker, 17 Sup. Ct. 18, 164 U. S. 46, 41 L. Ed. 345.

Act March 3, 1891 (26 Stat. 827, c. 517), authorizes appeals or writs of error from the district or circuit courts directly to the supreme court in cases of conviction of an infamous crime, and section 6 gives the circuit court of appeals power to review decisions in the circuit or district courts in cases not provided for by the preceding section, and in terms makes its judgments final in criminal cases. *Held*, that the decisions of the circuit courts of appeals are not final in cases of infamous crimes. Folsom v. U. S., 16 Sup. Ct. 222, 160 U. S. 121.

In the act of March 1, 1895, creating a court of appeals for the Indian Territory, and giving it full jurisdiction, civil and criminal, the provision of section 11, that "writs of error and appeals from the final decision of said appellate court shall be allowed, and may be taken to the circuit court of appeals for the Eighth judicial circuit, in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States," conferred upon that court full appellate jurisdiction, including that in cases of infamous crimes, which was theretofore vested in the United States supreme court. Harless v. U. S. (8th Circuit) 31 C. C. A. 397, 88 Fed. 97.

Act March 1, 1895 (2 Supp. Rev. St. p. 392), which extended the jurisdiction of the United States courts in the Indian Territory to capital cases, having also created the court of appeals in that territory, with power to entertain appeals and writs of error, the jurisdiction of such court to review judgments in capital cases is exclusive, and the supreme court has no appellate jurisdiction of such cases. Brown v. U. S., 19 Sup. Ct. 56; Curley v. Same, Id.

For amendment of this section, see page xlv., infra.

[8] In a case involving the construction or application of the constitution of the United States, the circuit court of appeals has no jurisdiction, though other questions are also involved. Hamilton v. Brown (5th Circuit) 3 C. C. A. 639, 53 Fed. 753.

The circuit court of appeals has no jurisdiction of an appeal from an interlocutory order granting a preliminary injunction when constitutional questions are involved. Town of Westerly v. Westerly Waterworks (1st Circuit) 76 Fed. 467, 22 C. C. A. 278; Same v. Seamen's Friend Soc., Id.

The questions whether the business of dealing in western meats constitutes interstate commerce, and whether certain city ordinances discriminate against such commerce, involve the construction or application of the constitution, and cannot therefore be considered by the circuit court of appeals. Mayor, etc., of Macon v. Georgia Packing Co. (5th Circuit) 9 C. C. A. 262, 60 Fed. 781.

The circuit courts of appeal have no jurisdiction of an appeal in which the only question involved is whether the proposed acts of the mayor and council of a city would deprive the appellant of his property without due process of law, in violation of the fourteenth amendment to the constitution of the

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United States. Barr v. City of New Brunswick (3d Circuit) 19 C. C. A. 71, 72 Fed. 689.

An appeal from a decree adjudging that a state statute fixing railroad rates is unreasonable, and therefore in violation of the fourteenth amendment to the federal constitution, is within the jurisdiction of the supreme court, and therefore not within the jurisdiction of the circuit court of appeals. Hastings v. Ames (8th Circuit) 15 C. C. A. 628, 68 Fed. 726.

Where the ground of the decision of the circuit court has no reference to the construction or application of the constitution or to the validity of any acts of congress, the jurisdiction of the circuit court of appeals to review such decision on appeal is not defeated by the fact that the constitutionality of certain acts of congress might have been challenged by the defeated party. World's Columbian Exposition v. U. S. (7th Circuit) 6 C. C. A. 58, 56 Fed. 654.

The fact that a party, in stating his claim of title, alleges that he will rely on certain written evidences of title, enumerating among them a treaty between the United States and a foreign country, and also the fifth amendment to the federal constitution, will not give the supreme court jurisdiction of a writ of error direct to the circuit court, where at the trial no right, title, privilege, or immunity was asserted to have been derived either from the treaty or the constitution, and no question as to the application or construction of the constitution, or the validity or construction of the treaty, was decided by the court. Muse v. Hotel Co., 18 Sup. Ct. 109, 168 U. S. 430.

A plea in abatement on the ground that the parties were "improperly or collusively" joined for the purpose of making a case cognizable in the federal courts, in the meaning of Act March 3, 1875, § 3, raises no issue involving the construction or application of the constitution, so as to make the case appealable directly from the circuit court to the supreme court. Merritt v. President of Bowdoin College, 18 Sup. Ct. 415, 169 U. S. 551.

The direction of a verdict does not entitle the opposite party to take the case to the supreme court on the ground that he was deprived of the right of jury trial, and that the case therefore involved the construction or application of the constitution of the United States. C. A. Treat Manuf'g Co. v. Standard Steel & Iron Co., 157 U. S. 674, 15 Sup. Ct. 718.

An issue as to whether due force and effect has been given to a judgment or decree of another state does not involve the construction or application of Const. U. S. art. 4, § 1, requiring "full faith and credit" to be given in each state to the public acts, records, and judicial proceedings of every other state, but rather involves the interpretation of Acts Cong. May 26, 1790, and March 27, 1804, declaring, in substance, that the "full faith and credit" mentioned in the constitution should consist in giving to a foreign judgment such faith and credit as it had in the courts of the state from which it was taken; and hence the circuit court of appeals has jurisdiction. Merritt v. Steel-Barge Co. (8th Circuit) 75 Fed. 813, 21 C. C. A. 525.

An averment, in a complaint seeking to set aside a mortgage foreclosure, that plaintiff, who owned the property, was not a party thereto, does not show that a construction of the constitutional provision as to due process of law is necessarily involved, so as to confer jurisdiction on the supreme court. Mr. Justice Brown dissenting. Cornell v. Green, 16 Sup. Ct. 969, 163 U. S. 75.

An injunction restraining the enforcement of a statute reducing the rates of fare chargeable by plaintiff, a street railroad company, was sustained by the circuit court on the ground that such statute was in violation of the state constitution, which provided that corporations should be created only by general law, while the statute in question was an amendment of the general law under which plaintiff was incorporated, but applied to no other corporation of the state. *Held*, that the circuit court of appeals was not without jurisdiction of an appeal from the order on the ground that the contract clause of the federal constitution was involved, since such claim could only arise in case the statute in question was passed in violation of the provision of the state constitution, in which case it was invalid, without reference to the question of impairment of contract. Appeal, Central Trust Co. v. Citizens' St. Ry. Co., 82 Fed. 1, dismissed. City of Indianapolis v. Central Trust Co. (7th Circuit) 83 Fed. 529, 27 C. C. A. 580.

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But the further contention in support of said injunction, that, if valid, the statute was an impairment of a vested contract right to charge a higher rate of fare, given plaintiff by the city ordinance under which it constructed its road, involves the application of the contract clause of the federal constitution, and fixes exclusive jurisdiction of an appeal in the supreme court. Appeal, Central Trust Co. v. Citizens' St. Ry. Co., 82 Fed. 1, dismissed. City of Indianapolis v. Central Trust Co. (7th Circuit) 83 Fed. 529, 27 C. C. A. 580.

An assignment of errors cannot be availed of to import into the cause a question involving the application of the United States constitution, if the record does not show that the question was raised in the court below, and rulings asked thereon. Cornell v. Green, 16 Sup. Ct. 969, 163 U. S. 75.

A party seeking to appeal is not put to an election of remedies where a constitutional question arises, but has a right to raise such question by a resort to the supreme court, and, while such appeal is pending, to avail itself of the defenses permissible under the sixth section of the act by an appeal to the circuit court of appeals; but the latter court will continue the cause to await the decision of the supreme court. McLish v. Roff (1891) 12 Sup. Ct. 118, 141 U. S. 661, distinguished. Pullman's Palace-Car Co. v. Central Transp. Co. (3d Circuit) 76 Fed. 401, 22 C. C. A. 246. But see Chappell v. U. S., 16 Sup. Ct. 397, 160 U. S 499; Scott v. Donald, 17 Sup. Ct. 265, 165 U. S. 58; Holder v. Aultman, Miller & Co., 18 Sup. Ct. 269, 169 U. S. 81.

This provision does not confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of defendant. U. S. v. Sanges, 144 U. S. 310, 12 Sup. Ct. 609.

• The circuit court of appeals has jurisdiction of an appeal from a decree in admiralty holding that the waters north of the boundary established by the treaty between the United States and Great Britain of June 15, 1846, in the straits of San Juan de Fuca, are not "foreign waters," within the meaning of Rev. St. § 4370, imposing a penalty against foreign tugs towing American vessels from one American port to another, except where the towing, in whole or in part, is on foreign waters, since neither the validity nor the construction of the treaty is drawn in question. The Pilot (9th Circuit) 3 C. C. A. 392, 53 Fed. 11.

A suit for a share of an award made under a treaty, based on a contract for a percentage of the award as counsel fees, does not involve the validity or construction of the treaty so as to confer appellate jurisdiction on the supreme court. Borgmeyer v. Idler, 195 U. S. 408, 16 Sup. Ct. 34.

The fact that a party, in stating his claim of title, alleges that he will rely on certain written evidences of title, enumerating among them a treaty between the United States and a foreign country, and also the fifth amendment to the federal constitution, will not give the supreme court jurisdiction of a writ of error direct to the circuit court, where at the trial no right, title, privilege, or immunity was asserted to have been derived either from the treaty or the constitution, and no question as to the application or construction of the constitution, or the validity or construction of the treaty, was decided by the court. Muse v. Hotel Co., 18 Sup. Ct. 109, 168 U. S. 430.

A case in the circuit court involving the validity of an act of congress and the construction of a treaty was decided on the merits against defendant, who took appeals on the whole case both to the supreme court direct and to the circuit court of appeals. The latter court affirmed the decree on the merits, deciding all the questions raised. *Held* that, by invoking the jurisdiction of the circuit court of appeals on the whole case, defendant waived his right to a decision by the supreme court on the direct appeal, and the same must be dismissed. Robinson v. Caldwell, 17 Sup. Ct. 343, 165 U. S. 359, 41 L. Ed. 745.

But a party seeking to appeal is not put to an election of remedies where a constitutional question arises. He has a right to raise such question by a resort to the supreme court, and, while such appeal is pending, to avail himself of the defenses permissible under the sixth section of the act by an appeal to the circuit court of appeals; but the latter court will continue the cause to await the decision of the supreme court. McLish v. Roff (1891) 12 Sup. Ct. 118, 141 U. S. 661, distinguished. Pullman's Palace-Car Co. v. Central Transp. Co. (3d Circuit) 76 Fed. 401, 22 C. C. A. 246.

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The circuit court of appeals has no jurisdiction of an appeal from an interlocutory order granting a preliminary injunction when constitutional questions are involved. Town of Westerly v. Westerly Waterworks (1st Circuit) 76 Fed. 467, 22 C. C. A. 278; Same v. Seamen's Friend Soc., Id.

The supreme court, having acquired jurisdiction of a case on the ground that the constitutionality of a law of the United States is drawn in question, may dispose of all the questions in the case, whether of jurisdiction or of merits. Chappell v. U. S., 16 Sup. Ct. 397, 160 U. S. 499; Scott v. Donald, 17 Sup. Ct. 265, 165 U. S. 58; Holder v. Aultman, Miller & Co., 18 Sup. Ct. 269, 169 U. S. 81.

[10] In a case in which the constitution or a law of the state is claimed to be in contravention of the constitution of the United States, the circuit court of appeals has no jurisdiction, though other questions are also involved. Hamilton v. Brown (5th Circuit) 3 C. C. A. 639, 53 Fed. 753; Wrightman v. Boone Co. (8th Circuit) 31 C. C. A. 570, 88 Fed. 435; Pauley Jail Bldg. & Mfg. Co. v. Crawford Co. (8th Circuit) 28 C. C. A. 579, 84 Fed. 942.

In Railway Co. v. Evans, in the Eighth circuit (7 C. C. A. 290, 58 Fed. 433), the court say that the act "evidently intended to vest the supreme court of the United States with exclusive jurisdiction to entertain appeals and writs of error for the review of cases which present constitutional questions, such as are enumerated in the fourth, fifth, and sixth subdivisions of the fifth section of the act; and the same remark may be made with reference to the cases mentioned in the second and third subdivisions of the same section. * * * It is only where the jurisdiction of the trial court is in issue, or is challenged, that a party has the right to prosecute an appeal or writ of error after final judgment, either to the supreme court or to the circuit court of appeals." But in this case the only question presented was whether a state statute contravened the constitution of the United States.

A party seeking to appeal is not put to an election of remedies where a constitutional question arises, but has a right to raise such question by a resort to the supreme court, under the fifth section, and, while such appeal is pending, to avail himself of the defenses permissible under the sixth section by an appeal to the circuit court of appeals, but the latter court will continue the cause to await the decision of the supreme court. McLish v. Roff (1891) 12 Sup. Ct. 118, 141 U. S. 661, distinguished. Pullman's Palace-Car Co. v. Central Transp. Co. (3d Circuit) 76 Fed. 401, 22 C. C. A. 246.

The mere fact that the validity of a state law under the constitution of the United States is drawn in question will not, of itself, deprive the circuit court of appeals of jurisdiction to decide other questions involved in the case; and, if it appears that the case may be disposed of upon grounds independent of the constitutional question, the court will take jurisdiction, and dispose of it accordingly. Where, therefore, on appeal from an interlocutory injunction, it appeared that, while the bill challenged the constitutionality of a state law, the further question was raised whether the case was one of equitable cognizance, the court held that it would take jurisdiction, and, being of opinion that the case was not of equitable cognizance, would dissolve the injunction, and order the bill to be dismissed. Green v. Mills (4th Circuit) 16 C. C. A. 516, 69 Fed. 852.

A suit in the circuit court to enjoin the enforcement of a city ordinance to establish and operate a system of waterworks, on the ground that such ordinance and a statute of the state authorizing the city to construct such works impair the obligations of a previous contract made by the city with a water company, is one "in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States," and an appeal lies directly to the supreme court. Penn Mut. Life Ins. Co. v. City of Austin, 18 Sup. Ct. 223, 168 U. S. 685.

Act Ark. March 21, 1893, providing that no judgment "rendered or to be rendered against any county in the state on county warrants * * * shall bear any interest after the passage of this act," includes judgments entered before its enactment, and, it being claimed that it was void as to them as impairing the obligation of contracts, *held*, that the case involved a constitutional question, and the circuit court of appeals had no jurisdiction. Pauley Jail Bldg. & Mfg. Co. v. Crawford County (8th Circuit) 84 Fed. 942, 28 C. C. A. 579.

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A suit between citizens of the same state to enjoin the collection of a state tax on the value of patent rights, on the ground that the state statute authorizing the tax contravenes the federal constitution, is not a suit arising under the patent laws, so as to give jurisdiction to the circuit court of appeals, but is one involving the validity of a state statute under the constitution of the United States, and must, therefore, be taken direct from the circuit court to the supreme court. Holt v. Manufacturing Co. (7th Circuit) 80 Fed. 1, 25 C. C. A. 301.

The circuit court of appeals has no jurisdiction of an appeal from an interlocutory order granting a preliminary injunction, when constitutional questions are involved. Town of Westerly v. Westerly Waterworks (1st Circuit) 76 Fed. 467, 22 C. C. A. 278; Same v. Seamen's Friend Soc., Id.

On a writ of error to review a decision of the circuit court on a constitutional question, the jurisdiction of the supreme court does not depend on the question whether the right claimed under the constitution of the United States has been upheld or denied below. Judgment (C. C. 1895) 68 Fed. 467, affirmed. Holder v. Aultman, Miller & Co., 18 Sup. Ct. 269, 169 U. S. 81.

Where the federal supreme court has acquired jurisdiction on the ground that the constitutionality of a state law is involved, it may dispose of all questions in the case. Scott v. Donald, 17 Sup. Ct. 265, 165 U. S. 58, 41 L. Ed. 632; Gardner v. Same, Id.; Chappell v. U. S., 16 Sup. Ct. 397, 160 U. S. 499; Holder v. Aultman, Miller & Co., 18 Sup. Ct. 269, 169 U. S. 81.

SEC. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error[11] final decision[12] in the district court[13] and the existing circuit courts,[14] in all cases other than those provided for in the preceding section of this act,[15] unless otherwise provided by law,[16] and the judgments or decrees of the circuit courts of appeals shall be final[17] in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states;[18] also in all cases arising under the patent laws,[19] under the revenue laws,[20] and under the criminal laws,[21] and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the supreme court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.[22] And thereupon the supreme court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit court of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final[23] in the circuit court of appeals it shall be competent for the supreme court to require, by *certiorari* or otherwise, any such case to be certified to the supreme court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court.[24]

In all cases not hereinbefore, in this section, made final, there shall be of right an appeal or writ of error or review of the case by the supreme court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs.[25] But no such appeal shall be

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taken, or writ of error sued out, unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

[11] This section has not changed the existing practice by which a review in equity cases is had by an appeal, and in cases of law by a writ of error. Stevens v. Clark (7th Circuit) 10 C. C. A. 379, 62 Fed. 321. See, also, Muhlenberg Co. v. Dyer (6th Circuit) 13 C. C. A. 64, 65 Fed. 634; Nelson v. Huidekoper (5th Circuit) 13 C. C. A. 658, 66 Fed. 616; U. S. v. Morgan (8th Circuit) 12 C. C. A. 6, 64 Fed. 4.

A circuit court of appeals has no jurisdiction to require, by mandamus, a territorial supreme court to admit to bail one convicted of crime, pending an appeal to such supreme court, after the question of his right to bail has been determined adversely to him by such supreme court on habeas corpus, since the writ of mandamus cannot take the place of an appeal or writ of error. U. S. v. Judges of United States Court of Appeals (8th Circuit) 85 Fed. 177, 29 C. C. A. 78.

A writ of habeas corpus cannot perform the office of a writ of error in reviewing proceedings for extradition, but can only reach error which is fatal to the jurisdiction of the officer over the person of the accused or the subject-matter of the accusation. Sternaman v. Peck (2d Circuit) 26 C. C. A. 214, 80 Fed. 883; Price v. McCarty (2d Circuit) 31 C. C. A. 162, 89 Fed. 84.

[12] The appellate jurisdiction of the circuit courts of appeals is restricted to the review of final judgments and decrees, with the single exception of interlocutory orders granting or continuing injunctions, as to which a right of appeal is given by section 7. Robinson v. Belt (8th Circuit) 5 C. C. A. 521, 56 Fed. 328.

The question whether a decree is final and appealable is not determined by the name which the court below gives it, but is to be decided by the appellate court on a consideration of the essence of what is done by the decree. Potter v. Beal (1st Circuit) 2 C. C. A. 60, 50 Fed. 860.

In general it is to be said that the question whether a judgment or decree is a "final decision," so as to be reviewable on error or appeal in the circuit courts of appeal is to be determined by the same rules and tests which are applied in ascertaining what are such final judgments and decrees as may be reviewed by the supreme court on error or appeal. The general subject of what are final appealable judgments and decrees is treated at length in a note to Trust Co. v. Madden (4th Circuit) 17 C. C. A. 238.

There is no power in the court of appeals whereby its affirmance or approval, on review of a decree of the circuit court, can give a finality to that decree which it did not have when entered of record in the circuit court. Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co. (6th Circuit) 19 C. C. A. 25, 72 Fed. 545, disapproved. Per Showalter and Woods, Circuit Judges, arguendo. Standard Elevator Co. v. Crane Elevator Co. (7th Circuit) 22 C. C. A. 549, 76 Fed. 767.

In jurisdictions where it is the practice in the circuit and district courts to enter judgment at once on the return of a verdict, and permit a motion to set aside the judgment and for a new trial to be thereafter made and determined, where such motion is seasonably made, at the term when the judgment was entered, the judgment remains subject to the control of the court until the motion is disposed of, and until that time does not become final for purposes of review on appeal or writ of error by the circuit court of appeals. Kingman & Co. v. Western Mfg. Co., 18 Sup. Ct. 786, 170 U. S. 675.

An order remanding a cause to a state court, from which it has been removed, is not a "final decision," within the meaning of this clause, Railway Co. v. Roberts, 141 U. S. 690, 12 Sup. Ct. 123; In re Coe (1st Circuit) 1 C. C. A. 326, 49 Fed. 481; neither is an order denying a motion to remand, Patten v. Cilley (1st Circuit) 1 C. C. A. 522, 50 Fed. 337; Potter v. Beal (1st Circuit) 2 C. C. A. 60, 50 Fed. 860; nor an order of the district court refusing to dismiss, for want of prosecution, a suit brought by an assignee in bankruptcy, In re Briggs (2d Circuit) 9 C. C. A. 585, 61 Fed. 498; nor an order allowing the claim of a creditor in bankruptcy, Duff v. Carrier (3d Circuit) 5 C. C. A. 178, 55 Fed. 433; nor a decree sustaining the validity of a patent, directing a perpetual injunction against infringement, and referring the cause to a

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master to take an account, Dudley E. Jones Co. v. Munger Improved Cotton Mach. Manuf'g Co. (5th Circuit) 2 U. S. App. 188, 1 C. C. A. 668, and 50 Fed. 785; Lockwood v. Wickes (8th Circuit) 21 C. C. A. 257, 75 Fed. 118.

A decree, made after final hearing on the merits, declaring infringement of a trade-mark, awarding a perpetual injunction, and referring the cause to a master for an accounting, is not an appealable final decree. Raymond v. Baking-Powder Co. (7th Circuit) 76 Fed. 465, 22 C. C. A. 276.

A decree, rendered at the suit of a stockholder, removing the liquidators of a corporation because they had interests adverse thereto, and appointing receivers having the powers and duties of liquidators in addition to the usual functions of receivers, is not a final decree as to the displaced liquidators, from which they can appeal either in their official or individual capacities. Dufour v. Lang (5th Circuit) 4 C. C. A. 663, 54 Fed. 913.

An order of the United States court for the Indian Territory, overruling a demurrer to an interplea, whereby a third person claims certain goods seized in attachment, is not a final judgment. Robinson v. Belt (8th Circuit) 5 C. C. A. 521, 56 Fed. 328.

An order dismissing two of three defendants sued on a joint obligation, because not served with process, is not a final order from which an appeal lies. Beck & Pauli Lith. Co. v. Wacker & Birk B. & M. Co. (7th Circuit) 76 Fed. 10, 22 C. C. A. 11.

An order, upon an intervening petition presenting a claim against an insolvent estate, which refers such claim to a master, though it purports also to sustain a demurrer to the petition as to part of the relief sought, is not final, and so not appealable. Trust Co. v. Sullivan (7th Circuit) 77 Fed. 778, 23 C. C. A. 458.

An order of the circuit court, denying the petition of nonresident creditors of an insolvent foreign corporation to be made formal parties to a suit for the appointment of ancillary receivers, and to be allowed to participate in the distribution of assets by such receivers, is not a final determination of the creditors' right to participate in such distribution, from which an appeal will lie to the circuit court of appeals. Jones & Laughlins v. Sands (2d Circuit) 79 Fed. 913, 25 C. C. A. 233.

A decree dissolving a partnership, enjoining, "until the final decree in this suit," both parties from disposing of the partnership property, directing that testimony be taken before a commissioner as to moneys claimed to have been advanced to the partnership by complainant, and that costs shall "abide the further and final decree of this court," is not a final, appealable decree. Ries v. Henderson (4th Circuit) 78 Fed. 515, 24 C. C. A. 194.

An order entered in the original cause, reviving the suit in the name of complainant's administrator, is not a final appealable decree. Mackaye v. Mallory (2d Circuit) 79 Fed. 1, 24 C. C. A. 420.

An order granting relief upon the party's complying with specified conditions, and providing that, if they are not complied with, the relief shall be denied, is not a final decree. Stratton v. Dewey (5th Circuit) 79 Fed. 32, 24 C. C. A. 435.

An order allowing the amendment of the bill of exceptions after the end of the term, and after the date fixed for settling the same and the removal of the case to the appellate court, is not a final decision such as can be made the subject of a separate suit in error. Honey v. Railroad Co. (8th Circuit) 82 Fed. 773, 27 C. C. A. 262; Railroad Co. v. Honey, Id.

A writ of error is not the appropriate remedy where a court refuses to proceed to hear and determine a cause, and therefore does not lie from a refusal of the court to order a cross defendant to plead to a counterclaim, there being no final judgment. Green v. Underwood (8th Circuit) 30 C. C. A. 162, 86 Fed. 427; Underwood v. Green, Id.

A decree may be a final appealable decree although, if no appeal be taken, a rehearing or bill of review would be available remedies in the court of original jurisdiction. Per Showalter, Circuit Judge. Standard Elevator Co. v. Crane Elevator Co. (7th Circuit) 22 C. C. A. 549, 76 Fed. 767.

Where a decree in admiralty sustains exceptions to the libel, and gives permission to amend within 10 days, otherwise the libel to stand dismissed, the prosecution of an appeal within that time is an election to waive the right to

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amend, so that the decree takes effect immediately, and becomes a final, appealable decree. U. S. v. The Three Friends, 17 Sup. Ct. 495, 166 U. S. 1, and 41 L. Ed. 897.

An order of court approving and confirming the clerk's accounts covering the disbursements of the proceeds of a foreclosure sale of a railroad becomes a final decree on the adjournment of the term. Coe v. Railroad Co. (5th Circuit) 85 Fed. 489, 29 C. C. A. 292.

One portion of a decree may be final, and for that reason appealable, while the remainder may be interlocutory, and not appealable. Per Showalter, Circuit Judge. Standard Elevator Co. v. Crane Elevator Co. (7th Circuit) 22 C. C. A. 549, 76 Fed. 767.

A decree by the circuit court, allowing a certain sum to complainant's solicitors for services rendered and to be rendered, and directing payment of the same out of the funds in the receiver's hands, in a suit by a stockholder against a corporation, in which a receiver has been appointed and an injunction granted, is pro tanto a final decree, from which an appeal will lie to the circuit court of appeals. Jacksonville, T. & K. W. Ry. Co. v. American Const. Co. (5th Circuit) 6 C. C. A. 249, 57 Fed. 66.

In Brush Electric Co. v. Electric Imp. Co. (9th Circuit) 2 C. C. A. 373, 51 Fed. 557, an order overruling a motion by the owner of a patent to dismiss, as to him, a suit by a licensee for infringement, as brought without his authority, was held to be a final decision, as the motion presented questions of law and fact not presented in the bill of complaint. In New Orleans v. Peake (5th Circuit) 2 C. C. A. 627, 52 Fed. 74, a creditor of the drainage fund held in trust by the city of New Orleans caused a receiver of the fund to be appointed, to whom, by order of court, a regular notarial transfer of its assets was made. Thereafter the receiver sold the property, and the court confirmed the sale. It was held that the decree of confirmation was a final decree, since it finally disposed of the possession and ownership of the property.

In Central Trust Co. v. Marietta & N. G. Ry. Co. (5th Circuit) 2 U. S. App. 1, 1 C. C. A. 116, and 48 Fed. 850, wherein it is held that, in railroad foreclosure proceedings, a decree sustaining an intervener's title to certain rolling stock in possession of the receiver is a final decree, the court, through Pardee, J., said: "The decision below * * * was a final decision upon the matter, distinct from the general subject of litigation. Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207, 10 Sup. Ct. 736. As a final decision, it comes directly within the jurisdiction given to the circuit courts of appeal. * * * While, perhaps, the court may, for its own protection, hereafter be compelled to insist that causes pending in the circuit and district courts shall not be brought to this court for review piecemeal, we are not inclined to enforce such a rule in this case, even if we have authority so to do."

In Grant v. Railroad Co. (5th Circuit) 2 U. S. App. 182, 1 C. C. A. 681, and 50 Fed. 795, an original bill was filed to foreclose a railroad mortgage. An auxiliary and dependent bill was afterwards, by leave of court, filed by certain bondholders against the complainant in the original bill, the defendant railroad company, and others, charging that certain bonds secured by the mortgage were invalid and not entitled to benefit thereunder. A decree was entered dismissing the auxiliary bill, with costs, but retaining the cause, and referring it to a master to ascertain the priority and validity of liens, and marshal conflicting claims to the bonds. The court held that this decree was final as to the claimants in the auxiliary bill, and that it had jurisdiction thereof.

Though the allowance or denial of an application to intervene in a suit rests in the discretion of the court, and no appeal can be taken from an order on such an application, when an order has been made admitting a party, though with leave reserved to others to move to strike out his pleadings, and on such motion an order is made denying the right to intervene or plead, such latter order, being, in effect, a dismissal of the party from the cause, is appealable as a final decree. Hamlin v. Railroad Co. (6th Circuit) 78 Fed. 664, 24 C. C. A. 271.

In Potter v. Beal (1st Circuit) 5 U. S. App. 49, 2 C. C. A. 60, and 50 Fed. 860, a national bank president, against whom an indictment was pending

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for violating the banking laws, brought a bill against the receiver of the bank to obtain possession of a trunk in its vaults, alleging that it contained his private papers. To this proceeding the United States district attorney was made a party defendant on his own petition, for the purpose of claiming the papers, in order that they might be laid before the grand jury. After a hearing, the court entered a decree purporting to be "in aid of the preliminary hearing," appointing a special master to make a private examination of the trunk, with directions to turn over to complainant any papers belonging to him, and to the receiver such papers as belonged to the bank and were not material to the prosecution against the president, and to reserve for further consideration such as concerned bank transactions and were material to the prosecution. All parties were enjoined from interfering with the trunk or its contents until the return of the master's report, or until the order was vacated. The president of the bank appealed from this order, and the first question raised was whether the appeal should be regarded as from an interlocutory order granting an injunction, under section 7, or whether it should be considered an appeal from a final decree. The court held that, as the order seemed to dispose of a part or the whole of the matter in controversy, so much of it as directed a distribution must be deemed a final decree.

An order of the circuit court discharging from imprisonment a defendant held under execution against his person upon a judgment in a civil action is final, and appealable to the circuit court of appeals. Stroheim v. Deimel (7th Circuit) 77 Fed. 802, 23 C. C. A. 467.

A decree entered in a proceeding by attorneys to enforce a lien for their fees, which adjudges that they are entitled to compensation to a definite amount and have a lien therefor on a fund in court, and directs payment thereof, is a final appealable decree, although the residue of the fund may not have been finally disposed of. Tuttle v. Claflin (2d Circuit) 31 C. C. A. 419, 88 Fed. 122.

A decree for specific performance, concluding all the rights of the parties, is a final decree, notwithstanding that a conveyance which it directs to be made is to be afterwards presented to the judges for their approval of its form and terms. Long v. Maxwell (4th Circuit) 8 C. C. A. 410, 59 Fed. 948.

A decree adjudging the complainant is the owner of the patents sued on; that the claims of said patents, or some of them, are valid; and that defendants have infringed them; and granting a perpetual injunction,—is appealable as a final decision upon the matters so adjudicated, although the decree further refers the cause to a master for an accounting of profits, and expressly reserves the question of costs. Per Showalter, Circuit Judge (Woods, Circuit Judge, contra). Standard Elevator Co. v. Crane Elevator Co. (7th Circuit) 22 C. C. A. 549, 76 Fed. 767.

An order signed by the judge, and entered by the clerk, finally dismissing certain defendants from the case, and directing the costs to be taxed, is a final appealable order, though the amount of the costs is not inserted therein. Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co. (2d Circuit) 84 Fed. 213, 28 C. C. A. 481.

A decree in admiralty, awarding libelants a definite sum, adjudging that a maritime lien exists therefor, and directing the sale of the vessel and payment of the proceeds into the registry to await the further order of the court, is a final appealable decree. The Eugene (9th Circuit) 31 C. C. A. 345, 87 Fed. 1001.

[13] The phrase "district judge of the district," in Act Sept. 13, 1888, § 13, allowing an appeal to the district judge of the district on a conviction before a commissioner of a Chinese person of unlawfully entering the United States, is an equivalent of "the district court," and a writ of error will lie from the circuit court of appeals to review his judgment on such appeal. U. S. v. Gee Lee (9th Circuit) 1 C. C. A. 516, 50 Fed. 271.

The circuit court of appeals has jurisdiction of an appeal from a final decision of a district judge at chambers in a habeas corpus case, as well as from a final decision of a district court. Webb v. York (8th Circuit) 21 C. C. A. 65, 74 Fed. 753.

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[14] A decree of the circuit court on an appeal in admiralty taken prior to July 1, 1891, is reviewable in the circuit court of appeals. The Mattano (4th Circuit) 3 C. C. A. 325, 52 Fed. 876; The Alejandro (9th Circuit) 6 C. C. A. 54, 56 Fed. 621.

[15] By this and the preceding section, taken in connection with the repealing provisions of section 14, the entire appellate jurisdiction was distributed between the supreme court and the circuit court of appeals. Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517.

The circuit courts of appeals succeed to the appellate jurisdiction of the circuit courts under Rev. St. § 763, for reviewing habeas corpus proceedings in the district courts, Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517; Virginia v. Paul, 148 U. S. 107, 13 Sup. Ct. 536; U. S. v. Fowkes (3d Circuit) 3 C. C. A. 394, 53 Fed. 13; and to the appellate jurisdiction under Rev. St. § 4980, in bankruptcy cases, but only where the judgment or decree of the district court is final, Duff v. Carrier (3d Circuit) 5 C. C. A. 178, 55 Fed. 433; In re Briggs (2d Circuit) 9 C. C. A. 585, 61 Fed. 498. But the supervisory jurisdiction over bankruptcy proceedings conferred on the circuit courts by Rev. St. § 4986, is not affected by this act. Id. To the same effect is Huntington v. Saunders (1st Circuit) 18 C. C. A. 409, 72 Fed. 10.

The circuit court of appeals has no jurisdiction to award a writ of habeas corpus, to be served outside of the circuit for which it sits, to secure the release of a person there held in custody. In re Boles (8th Circuit) 1 C. C. A. 48, 48 Fed. 75.

There is no limitation upon the jurisdiction of the circuit court of appeals in respect to the amount in controversy. Railroad Co. v. Amato (2d Circuit) 1 C. C. A. 468, 49 Fed. 881; Courtney v. President, etc. (8th Circuit) 1 C. C. A. 249, 49 Fed. 309.

An appeal from a decree of a circuit court in a suit by contractors, against the United States, to recover for materials furnished for the construction of a levee, must go in the first instance to the circuit court of appeals, and not to the supreme court. Ogden v. U. S., 148 U. S. 390, 13 Sup. Ct. 602.

The circuit court of appeals has jurisdiction to review on writ of error the judgment of a circuit court in an action of ejectment by a landowner against the agent of the United States in charge of the St. Mary's ship canal, the piers of which are built upon the submerged land lying in front of plaintiff's lot; such suit involving questions as to the government's ownership and control of such submerged lands on the borders of the St. Mary's river. Scranton v. Wheeler (6th Circuit) 6 C. C. A. 585, 57 Fed. 803.

The circuit courts of appeal have appellate jurisdiction in all cases in which original jurisdiction is conferred by reason of United States being plaintiffs or petitioners, including the case of a bill by the United States to cancel a patent for an invention. U. S. v. American Bell Tel. Co., 159 U. S. 548, 16 Sup. Ct. 69.

While, perhaps, there may be no appeal from ordinary questions of costs within the common jurisdiction of taxing masters, yet there may be such an appeal when the force of a statute or some positive rule of law is involved, though it concerns only costs, since the right of appeal given by Act March 3, 1891, § 6, is of the broadest character. The City of Augusta (1st Circuit) 80 Fed. 297, 25 C. C. A. 430; Handy v. Adams, Id.

An appeal from a mere decree for costs of the court below must be dismissed, as a matter within that court's discretion. But where one item included in the decree is for clerk's fees in making and certifying the transcript on a former appeal, the appellate court may review the same on the merits. Blanks v. Klein (5th Circuit) 78 Fed. 395, 24 C. C. A. 144; Starcke v. Same, Id.

Where, after the granting of an interlocutory decree and accounting, the patent expires, and the patentee then waives the accounting, and takes a decree for nominal damages and costs, the only substantial question raised by an appeal therefrom is the question of costs, and, as that is in the discretion of the court below, the appeal must be dismissed. Gamewell Fire-Alarm Telegraph Co. v. Municipal Signal Co. (1st Circuit) 77 Fed. 490, 23 C. C. A. 250.

[16] The words "unless otherwise provided by law" do not refer to prior laws, but were inserted out of abundant caution to guard against implied repeals. Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517; Hubbard v. Soby, 146 U.

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S. 56, 13 Sup. Ct. 13; American Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 13 Sup. Ct. 758; Louisville Public Warehouse Co. v. Surveyor (6th Circuit) 1 C. C. A. 371, 49 Fed. 561. A contrary opinion was intimated in Re Coe (1st Circuit) 1 C. C. A. 326, 49 Fed. 481.

The circuit courts of appeals have jurisdiction to review, on error, a judgment of the circuit court in an action against the United States, brought under the Tucker act of March 3, 1887 (24 Stat. 505). Cases of this description are not "otherwise provided by law," within the meaning of this section. U. S. v. Coudert (2d Circuit) 19 C. C. A. 543, 73 Fed. 505.

[17] The supreme court may entertain jurisdiction to pass upon the jurisdiction of the circuit court of appeals when involving the question of the finality of its judgment. Mining Co. v. Ripley, 151 U. S. 79, 14 Sup. Ct. 236.

Where, in a suit between citizens of different states, the decree of a circuit court of appeals is final, a decree upon intervention in the same suit, involving the right to property in the actual possession of the circuit court, is likewise final. Gregory v. Van Ee, 16 Sup. Ct. 431, 160 U. S. 643.

[18] The question whether the jurisdiction is dependent entirely upon diverse citizenship, so as to render the judgment of the circuit court of appeals "final," is to be determined by the showing made by the summons and declaration. Subsequent proceedings are not to be regarded. Borgmeyer v. Idler, 159 U. S. 408, 16 Sup. Ct. 34.

The provision making the judgment of the circuit court of appeals final where its jurisdiction is based on the diverse citizenship of the parties, applies where the jurisdiction is originally invoked on that ground, though another ground is developed in course of the proceedings. Ex parte Jones, 17 Sup. Ct. 222, 164 U. S. 691, and 41 L. Ed. 601.

Jurisdiction over an intervening petition to recover damages for personal injuries against railroad receivers is referable to the jurisdiction in the suit in which they were appointed; and, where that depends on diverse citizenship alone, a judgment by the circuit court of appeals is not reviewable by the supreme court. Rouse v. Letcher, 156 U. S. 47, 15 Sup. Ct. 266; Rouse v. Hornsby, 161 U. S. 588, 16 Sup. Ct. 610.

A decree of the circuit court of appeals is "final" in a suit of which the circuit court had jurisdiction only because it was ancillary or supplemental to a previous suit, in which the jurisdiction was based entirely upon diverse citizenship. Carey v. Railroad Co., 161 U. S. 115, 16 Sup. Ct. 537.

The court's jurisdiction to pass upon conflicting claims to property in possession of its receiver appointed in a case of diverse citizenship is also to be regarded as based on diverse citizenship, so as to make the decree "final." Carey v. Railroad Co., 161 U. S. 115, 16 Sup. Ct. 537. See, also, Gregory v. Van Ee, 160 U. S. 643, 16 Sup. Ct. 431.

In an action by a citizen of one state against a federal corporation, alleged to be a citizen of another state, the judgment of the circuit court of appeals is not final, though jurisdiction is invoked on the sole ground of diverse citizenship. Railroad Co. v. Harris, 158 U. S. 326, 15 Sup. Ct. 843.

A suit on an assigned chose in action was dismissed by the circuit court because the only ground of jurisdiction was diverse citizenship, and plaintiff had failed to show that his assignor could have maintained the suit. This decision was affirmed by the circuit court of appeals. *Held*, that the decree of affirmance was final, because the case was one "dependent entirely upon the opposite parties to the suit or controversy" being citizens of different states, and, hence, that the supreme court had no jurisdiction of an appeal therefrom. Benjamin v. City of New Orleans, 18 Sup. Ct. 298, 169 U. S. 161.

[19] This refers only to suits at law and in equity for infringement, and to suits in equity for interference and to obtain patents. It does not apply to suits brought by the United States to cancel patents; for in such suits the circuit courts of appeal have jurisdiction on the additional ground that the United States are a party, and in suits coming within their jurisdiction on that ground their decisions are not made final. Therefore, in such cases, an appeal lies from the circuit courts of appeal to the supreme court. U. S. v. American Bell Tel. Co., 159 U. S. 548, 16 Sup. Ct. 69.

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A suit between citizens of the same state to enjoin the collection of a state tax on the value of patent rights, on the ground that the state statute authorizing the tax contravenes the federal constitution, is not a suit arising under the patent laws so as to give jurisdiction to the circuit court of appeals, but is one involving the validity of a state statute under the constitution of the United States, and must, therefore, be taken direct from the circuit court to the supreme court.—Holt v. Manufacturing Co. (7th Circuit) 80 Fed. 1, 25 C. C. A. 301.

[20] A judgment of the circuit court on an appeal from the decision of the board of general appraisers is reviewable in the circuit court of appeals, the case being one "arising under the revenue laws." U. S. v. Hopewell (1st Circuit) 2 C. C. A. 510, 51 Fed. 798.

The circuit court of appeals will not review a finding of facts by the board of general appraisers, not controverted by new evidence in the circuit court, unless manifestly unsupported by the evidence or clearly against the weight thereof. Apgar v. U. S. (7th Circuit) 78 Fed. 332, 24 C. C. A. 113.

[21] This clause does not give jurisdiction to the circuit court of appeals in case of a conviction of an infamous crime. U. S. v. Sutton (9th Circuit) 2 C. C. A. 115, 47 Fed. 129.

Section 5 authorizes appeals or writs of error from the district or circuit courts directly to the supreme court in cases of conviction of an infamous crime, and section 6 gives the circuit court of appeals power to review decisions in the circuit or district courts in cases not provided for by the preceding section, and in terms makes its judgments final in criminal cases. *Held*, that the decisions of the circuit courts of appeals are not final in cases of infamous crimes. Folsom v. U. S., 16 Sup. Ct. 222, 160 U. S. 121.

In the act of March 1, 1895, creating a court of appeals for the Indian Territory, and giving it full jurisdiction, civil and criminal, the provision of section 11, that "writs of error and appeals from the final decision of said appellate court shall be allowed, and may be taken to the circuit court of appeals for the Eighth judicial circuit, in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States," conferred upon that court full appellate jurisdiction, including that in cases of infamous crimes, which was theretofore vested in the United States supreme court. Harless v. U. S. (8th Circuit) 31 C. C. A. 397, 88 Fed. 97.

A scire facias on a recognizance to answer a charge of crime is a case arising "under the criminal laws." Hunt v. U. S., 17 Sup. Ct. 609, 166 U. S. 424, and 41 L. Ed. 1063.

Section 5 authorizes appeals or writs of error directly to the supreme court in certain cases, including those of conviction of a capital or otherwise infamous crime. Section 6 makes the judgments or decrees of the circuit courts of appeals final "in all cases arising under the criminal laws," and in certain other cases, unless questions are certified to the supreme court, or the whole case ordered up by a writ of certiorari. Section 14 repeals all acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error, in sections 5 and 6. *Held*, that Rev. St. §§ 651, 697, authorizing a certificate of division of opinion on the part of the circuit court in criminal cases in order to obtain the opinion of the supreme court, were impliedly repealed. U. S. v. Rider, 16 Sup. Ct. 983, 163 U. S. 132; Same v. Hewecker, 17 Sup. Ct. 18, 164 U. S. 46, and 41 L. Ed. 345.

This provision does not confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of defendant. U. S. v. Sanges, 144 U. S. 310, 12 Sup. Ct. 609.

[22] The circuit court of appeals will not certify up a question which, in its opinion, has already been determined by the supreme court, in prior cases. Lau Ow Bew v. U. S. (9th Circuit) 1 C. C. A. 1, 47 Fed. 641. But see In re Lau Ow Bew, 141 U. S. 583, 12 Sup. Ct. 43, in which the supreme court held that the precise question at issue in this case had not been decided by it, and therefore awarded a writ of certiorari to the circuit court of appeals.

The circuit court of appeals will not certify the questions in a case to the supreme court, except before it decides them, and upon its own motion. An-

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drews v. National Foundry & Pipe Works (7th Circuit) 77 Fed. 774, 23 C. C. A. 454; City of Oconto v. Same, Id.

Whether a question shall be certified to the supreme court rests in the discretion of the circuit court of appeals; but it is not a discretion the exercise of which may be invoked by a party as of right. The certification is for the instruction of the court upon doubtful questions; and a party cannot be permitted, in advance of the argument of the cause, to move to have certain questions alleged to arise certified up. Railway Co. v. Pope (7th Circuit) 20 C. C. A. 253, 74 Fed. 1.

Petition for certificate denied where the questions involved were as to the liability of steamships for injury to baggage for negligent stowage and other causes. The Majestic (2d Circuit) 13 C. C. A. 676, 69 Fed. 844.

Where an appeal is taken to the supreme court direct, on the ground that the case involves the construction or application of the constitution of the United States, and an appeal is also taken to the circuit court of appeals, the latter court will stay its hand until the appeal in the supreme court is disposed of, and will not in the meantime certify to the supreme court the question whether it has jurisdiction to hear and determine the cause. Pullman's Palace-Car Co. v. Central Transp. Co. (3d Circuit) 83 Fed. 1, 27 C. C. A. 389.

Where the district judge is disqualified by reason of having heard the question below, and the circuit judge is also perhaps disqualified by reason of having decided a similar question in another case, and it appears that another cause is pending in the supreme court which is connected with the one under consideration, so that the two can probably be argued together, it is a proper exercise of discretion to certify the cause to the supreme court. Bank v. Armstrong (6th Circuit) 1 C. C. A. 394, 49 Fed. 600.

A circuit court of appeals will not withhold a decision of other questions presented because on one out of many it desires the opinion of the supreme court. Sigafus v. Porter (2d Circuit) 84 Fed. 430, 28 C. C. A. 443.

The certification of questions from the circuit court of appeals to the supreme court is governed by the rules which obtained in respect of certification of division of opinion from the circuit courts. U. S. v. Union Pac. Ry. Co., 18 Sup. Ct. 167, 168 U. S. 505.

The circuit court of appeals cannot send up the whole record at the time of certifying a question, for that matter lies entirely with the supreme court. Bank v. Armstrong (6th Circuit) 1 C. C. A. 394, 49 Fed. 600.

Questions certified to the supreme court by the circuit court of appeals must be upon distinct points or propositions of law, so that each may be definitely answered without regard to other issues of law in the case. Graver v. Faurot, 162 U. S. 435, 16 Sup. Ct. 799; Cross v. Evans, 167 U. S. 60, 17 Sup. Ct. 733; U. S. v. Union Pac. Ry. Co., 168 U. S. 505, 18 Sup. Ct. 167; Del Monte Mining & Milling Co. v. Last-Chance Mining & Milling Co., 171 U. S. 55, 18 Sup. Ct. 895; Sigafus v. Porter (2d Circuit) 29 C. C. A. 391, 85 Fed. 689.

The circuit courts of appeal are authorized to certify to the supreme court only questions or propositions of law, unmixed with questions of fact or of mixed law and fact, and care must be taken that the certificate shall not be in such form as to present the whole case for consideration. Warner v. City of New Orleans, 17 Sup. Ct. 892, 167 U. S. 467.

A question certified from a circuit court of appeals which requires the supreme court to determine whether its decision in a former case, involving many questions, is applicable to the facts of the case at bar, and operates as a bar to the action, does not come within the power given by the judiciary act to certify "questions or propositions of law," but is in effect submitting the whole case instead of a question of law, and will not be considered. Warner v. City of New Orleans, 17 Sup. Ct. 892, 167 U. S. 467.

A certificate of the circuit court of appeals which asserts that, as its judgment "differs from that of a co-ordinate court, the instruction of the supreme court is requested upon the question," is essentially defective, since it neither specifically sets forth the question to be answered, nor states that instruction is desired for the proper decision of such question. Watch Co. v. Robbins, 148 U. S. 266, 13 Sup. Ct. 594.

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[23] A decree in a case of habeas corpus is "made final" by the effect of the section in giving the circuit court of appeals jurisdiction over that class of cases, and is reviewable on certiorari. Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517.

The power of the supreme court to review, by writ of certiorari to the circuit court of appeals, cases made final in that court, extends to cases brought there by appeals under section 7 from interlocutory decrees granting or continuing injunctions, and it is left to the discretion of the supreme court to determine at what stage of the proceedings it will exercise this power; but the writ will not be issued at all in such cases unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause. American Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 13 Sup. Ct. 758. It seems that the supreme court will not issue a writ of certiorari to review a judgment of the circuit court of appeals reversing a judgment of the circuit court, and remanding the cause for further proceedings, for such a judgment is not final, and the supreme court is therefore without jurisdiction to revise it. Railway Co. v. Osborne, 146 U. S. 354, 13 Sup. Ct. 281.

[24] The supreme court may by certiorari direct any case to be certified, whether its advice is requested or not, except those which may be brought up by appeal or writ of error. Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517.

The power of the supreme court in certiorari extends to every case pending in the circuit courts of appeals, and may be exercised at any time during such pendency, if the case is one which would otherwise be finally determined in that court; and, while this power will be sparingly exercised, it is properly exercised where there is a conflict between a circuit court of appeals and the supreme court of the state as to whether a large body of land has been validly annexed to the territory of a city. Forsyth v. City of Hammond, 17 Sup. Ct. 665, 166 U. S. 506, and 41 L. Ed. 1095.

Certiorari may issue to a circuit court of appeals after final disposition of the case in that court, and it is immaterial that the mandate has already gone down. The Conqueror, 17 Sup. Ct. 510, 166 U. S. 110, and 41 L. Ed. 937.

A decision of a circuit court of appeals, dismissing for want of jurisdiction a case in which its judgment is final, is properly reviewable by the supreme court on certiorari. Kingman & Co. v. Western Mfg. Co., 18 Sup. Ct. 786, 170 U. S. 675.

The supreme court may issue certiorari to the circuit court of appeals to bring up a cause pending therein, before that court has acted upon it; and the writ will be issued in a case of great public concern, involving the interpretation of our neutrality laws, pending an insurrection against a foreign government. U. S. v. The Three Friends, 17 Sup. Ct. 495, 166 U. S. 1, and 41 L. Ed. 897.

Certiorari will be issued under this clause only in cases involving questions of gravity and importance, or in the interest of uniformity of decision. Lau Ow Bew v. U. S., 141 U. S. 583, 12 Sup. Ct. 43; Id., 144 U. S. 47, 12 Sup. Ct. 517; In re Woods, 143 U. S. 202, 12 Sup. Ct. 417; American Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 13 Sup. Ct. 758. And of this character, manifestly, is the question whether, under the Chinese exclusion act (23 Stat. 115), taken in connection with the Chinese treaties (16 Stat. 740, and 22 Stat. 58), a Chinese merchant long domiciled in this country, on returning from a temporary absence, can be denied the right to land without presenting the certificate of identity required by the sixth section of that act. Id.

But, on the other hand, certiorari will not issue to determine a question as to whether, in an action for personal injuries, a judgment of dismissal, at the conclusion of plaintiff's evidence, is a bar, under the Minnesota law, to another suit on the same cause of action, or whether, in such an action, the law in respect to the recovery of a servant against his master was properly applied to the special facts disclosed by the evidence. In re Woods, 143 U. S. 202, 12 Sup. Ct. 417.

Where the circuit court of appeals entertained an appeal from an order appointing a receiver for a railroad company, and enjoining the disposition of its

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property, and not only modified the injunction, but also directed the circuit court to discharge the receiver and restore the property to the company, it was held that the case was not one for the interposition of the supreme court by writ of certiorari, for this branch of its jurisdiction is to be sparingly exercised; and the decree of the circuit court of appeals was neither so important in its immediate effect, nor so far-reaching in its consequences, as to warrant the supreme court in issuing the writ. American Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 13 Sup. Ct. 759.

Where, however, upon an appeal from an order made in the circuit court by the district judge, setting aside an order made by the circuit judge, the circuit judge takes part in the decision in the circuit court of appeals, the question whether he was not disqualified to so take part under section 3, and whether the decree of the circuit court of appeals was not therefore void, is one which deeply affects the administration of justice in that court; and, in order to determine the same, the supreme court will issue a rule to show cause why a writ of certiorari should not issue; and if it should be determined upon the hearing thereof that the circuit judge was disqualified, and that the decree was therefore void, the writ will issue to bring up and quash the same. American Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 13 Sup. Ct. 759.

Certiorari will not lie to review the action of the circuit court of appeals in dismissing, on motion, an appeal from the dismissal by the circuit court of a bill for injunction, in obedience to a decree of the circuit court of appeals, made on the merits in an appeal from the interlocutory decree of the circuit court granting the injunction. Smith v. Iron Works, 17 Sup. Ct. 407, 165 U. S. 518, and 41 L. Ed. 810; Norton v. Wheaton, Id.

It seems that an application for certiorari to review a decision of a circuit court of appeals may be made within one year, by analogy to the time allowed for taking an appeal or writ of error to review its decisions. The Conquerer, 17 Sup. Ct. 510, 166 U. S. 110, and 41 L. Ed. 937.

A decree was entered by a circuit court of appeals June 6th, immediately after the adjournment of the supreme court, and an application to the supreme court for certiorari to review the same was made on April 16th following. *Held*, that as the application was made during the next term, and within one year from the date of the decree, it was not too late. The Conquerer, 17 Sup. Ct. 510, 166 U. S. 110, and 41 L. Ed. 937.

Where the circuit court of appeals has reversed a decree dismissing a libel, with directions to assess damages, and a second appeal is taken from the decree assessing damages, which is affirmed, the supreme court, on certiorari thereafter sued out, may review the whole case. Panama R. Co. v. Napier Shipping Co., 17 Sup. Ct. 572, 166 U. S. 280, and 41 L. Ed. 1004.

Only the errors assigned by the petitioner at whose instance the writ of certiorari was issued can be considered by the supreme court, though the case was heard in the circuit court of appeals on appeals by both parties. Hubbard v. Tod, 19 Sup. Ct. 14.

[25] As a case of habeas corpus is not one in which the matter in controversy involves a money value, no appeal lies from the circuit court of appeals to the supreme court under this section. Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517.

Tex. St. §§ 2899–2909, providing, in certain cases, for an action for injuries causing death, which shall be for the exclusive benefit of the surviving husband, wife, children, and parents, and authorizing the action to be brought by all the parties entitled, or by any one or more of them for the benefit of all, and requiring the jury to divide the amount recovered among the persons entitled to the benefit of the action, create but a single liability on defendant's part, and contemplates but one action, and the question whether the "matter in controversy" exceeds $1,000, so as to confer appellate jurisdiction on the supreme court, is determined by the total amount recovered, and not by that allowed to any one of the beneficiaries of the action. Railway Co. v. Gentry, 16 Sup. Ct. 1104, 163 U. S. 353.

This section does not authorize a review of a refusal to revise a discharge in bankruptcy merely because the claim of the petitioner for revision amounts to more than $1,000, or because, if the discharge were refused, something

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might be made out of the bankrupt. Huntington v. Saunders, 16 Sup. Ct. 1120, 163 U. S. 319.

To sustain the appellate jurisdiction, the bill need not expressly show the jurisdictional amount, but that fact may be made to appear by stipulation or affidavit in the appellate court. Such a stipulation, however, is not controlling, but may be considered in connection with other circumstances. U. S. v. Trans-Missouri Freight Ass'n, 17 Sup. Ct. 540, 166 U. S. 290, and 41 L. Ed. 1007.

In a suit to enjoin an association of railroads alleged to be illegal as restraining interstate commerce between competitive points, the fact that daily interstate shipments from the competitive points in question exceed $1,000 in value, and that it is alleged in the answer that free competition would cause great losses and possible financial ruin to the railroad companies, sufficiently shows that there was in controversy the $1,000 required to sustain an appeal from the circuit court of appeals to the supreme court. U. S. v. Trans-Missouri Freight Ass'n, 17 Sup. Ct. 540, 166 U. S. 290, and 41 L. Ed. 1007.

Where federal jurisdiction is dependent upon the fact that the defendant is a corporation created by an act of congress, and the amount involved exceeds $1,000, the judgment of the circuit court of appeals is reviewable as of right on writ of error, since the cause does not fall within any of the classes of cases in which its judgment is made "final." Railroad Co. v. Amato, 144 U. S. 465, 12 Sup. Ct. 740.

The supreme court has no jurisdiction to review, upon writ of error, the action of a circuit court of appeals in affirming the judgment of a circuit court rendered in a suit to recover damages for infringement of a copyright, where the plaintiff had claimed no right under the copyright laws of the United States, but had maintained the action wholly upon the right given by the common law. Publishing Co. v. Monroe, 17 Sup. Ct. 40, 164 U. S. 105, and 41 L. Ed. 367.

As an appeal will lie from the circuit court to the supreme court only in the cases prescribed in the act, it will not lie in a copyright case, which may be appealed from the circuit court of appeals, merely because the circuit court, by the form of its entry, made the decree of the circuit court of appeals, affirming a previous decree of the circuit court, its own decree. Webster v. Daly, 16 Sup. Ct. 961, 163 U. S. 155.

An appeal taken to the circuit court of appeals from a decree of the circuit court entered in accordance with the mandate of the former court upon a previous appeal will be dismissed, even though an appeal lie to the supreme court from the decision of the circuit court of appeals. Merrill v. Bank (5th Circuit) 78 Fed. 208, 24 C. C. A. 63.

A party who takes to the circuit court of appeals a cause involving more than $1,000, and not belonging to any of the classes in which the judgment of that court is made "final," does not waive his right to a review of such judgment by the supreme court, even though he might have taken the cause direct from the circuit court to the supreme court in the first instance. Railroad Co. v. Amato, 144 U. S. 465, 12 Sup. Ct. 740.

A writ of error from the supreme court does not lie to review a judgment of the circuit court of appeals which is not a final judgment. MacLeod v. Graven (6th Circuit) 79 Fed. 84, 24 C. C. A. 449.

No appeal lies to the supreme court from a decree of the circuit court of appeals affirming an interlocutory order of the circuit court granting a temporary injunction. Kirwan v. Murphy, 18 Sup. Ct. 592, 170 U. S. 205.

A decree of affirmance, without specifying the sum for which it is rendered, is a final decree or judgment, from which an appeal or writ of error will lie. Railway Co. v. Gentry, 16 Sup. Ct. 1104, 163 U. S. 353.

Though the decision of the supreme court revises the decree of the circuit court in reviewing the action of the court of appeals thereon, and, under the statute, the mandate goes to the circuit court only, it is the judgment of the circuit court of appeals that is to be revised, and hence such judgment will not, ordinarily, be re-examined on the suggestion of error in that court, in that it did not hold as erroneous an action on the part of the circuit court which was not complained of. Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 16 Sup. Ct. 1173, 163 U. S. 564; Same v. Chicago, M. & St. P. Ry. Co., Id.

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SEC. 7. That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals:[26] *provided*, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court during the pendency of such appeal.[27]

[26] The circuit courts of appeals can have no jurisdiction of an appeal from an interlocutory decree granting or continuing an injunction if the case is of such a character that they would have no jurisdiction of an appeal from a final decree therein. City of Macon v. Georgia Packing Co. (5th Circuit) 9 C. C. A. 262, 60 Fed. 781.

This section gives no jurisdiction of an appeal from an interlocutory order dismissing a restraining order and denying an injunction. Robinson v. City of Wilmington (4th Circuit) 9 C. C. A. 84, 60 Fed. 469.

A decree which is rendered after full hearing on the merits, and which sustains the validity of a patent, declares infringement, and awards a perpetual injunction and an accounting, is an "interlocutory decree" granting an injunction, from which an appeal will lie to the circuit court of appeals. Dudley E. Jones Co. v. Munger Improved Cotton Mach. Manuf'g Co. (5th Circuit) 1 C. C. A. 668, 50 Fed. 785; Richmond v. Atwood (1st Circuit) 2 C. C. A. 596, 52 Fed. 10. But an order denying a rehearing in such case is not appealable, as it is not an interlocutory order continuing an injunction. Boston & A. R. Co. v. Pullman's Palace Car Co. (1st Circuit) 2 C. C. A. 172, 51 Fed. 305.

An order made on motion of an intervener, staying the proceedings in an equity case in the United States circuit court, and vacating a receivership until the further order of the court, is an interlocutory order granting an injunction. Pennsylvania Co. for Insurance on Lives, etc., v. Jacksonville, T. & K. W. Ry. Co. (5th Circuit) 5 C. C. A. 54, 55 Fed. 131.

The docket entry in a suit for infringement of a patent, "Opinion—Decree for complainants," does not constitute a decree for an injunction, nor can such entry be aided for that purpose by reference to the opinion; and hence an appeal taken before any decree is drawn is premature. Herrick v. Cutcheon (1st Circuit) 5 C. C. A. 21, 55 Fed. 6.

In Richmond v. Atwood (1st Circuit) 2 C. C. A. 596, 52 Fed. 10, the court say: "We think the term 'interlocutory order or decree' was used in its broadest sense, and that the purpose of congress was to confer the right of appeal from any decree or order granting an injunction, at any stage of the proceeding, whether technically preliminary, interlocutory, or final." And, again: "Full scope should be given to this provision of the statute, to the end that any party aggrieved by any order or decree granting an injunction, at any stage of the proceedings, may have a speedy remedy by appeal."

There is a conflict in the decisions on the question whether the circuit court of appeals, upon an appeal from an interlocutory decree, may review the whole case on the merits, and render a decree finally disposing of it. In Richmond v. Atwood, in the First circuit (2 C. C. A. 596, 52 Fed. 10), it was held on an appeal from a decree, rendered after full hearing on the merits, which sustained a patent, declared infringement, and awarded a perpetual injunction and an accounting, where the whole record was before the circuit court of appeals, and, in order to determine the rightfulness of the injunction, the court necessarily examined the whole case on the merits, and reached the conclusion that there was no infringement, that it might not only reverse the decree and dissolve the injunction, but might also vacate the order for an accounting, and order the bill dismissed; thus rendering such a decree as the lower court should have rendered on the whole case. This decision was ren-

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dered upon a motion for a rehearing and a petition that the question as to the construction of the patent should be certified to the supreme court. On the original hearing (1st Circuit, 1 C. C. A. 144, 48 Fed. 910), the question as to the power of the circuit court of appeals to hear and finally determine the case upon the merits was not raised. At the hearing of the motion for a rehearing, etc., the court raised the question as to its jurisdiction to entertain an appeal at the state of the proceeding reached in the cause, and, if such jurisdiction existed, whether the mandate should direct a final disposition of the cause in the court below. After argument, the motion for rehearing and petition for certification were denied, and a mandate was issued, with a direction that the bill be dismissed. On the question as to the form of mandate, the opinion was expressed that, "while the appellate court is not bound by an inflexible rule so to do, it may, in its discretion, and should, when equity so requires, make full direction as to the manner in which the cause shall be disposed of below."

In Dudley E. Jones Co. v. Munger Improved Cotton Mach. Manuf'g Co., in the Fifth circuit (1 C. C. A. 159, 49 Fed. 61), on an appeal from a similar decree, the power of the circuit court of appeals to hear and finally determine the case upon the merits was not raised. The court reversed the decree below, and remanded the cause, with instructions to dismiss the bill. Afterwards the complainant applied for a rehearing, and at the same time moved the court to vacate all its proceedings therein, and dismiss the appeal for want of jurisdiction, claiming that the decree below was neither a final decree nor an appealable interlocutory decree, under this section. It was held, however, that the court had jurisdiction under this section, and that the complainant, by submitting the cause on its merits, had waived his right to object to a full determination of the controversy, and could not thereafter question the jurisdiction on a motion for rehearing. The court, nevertheless, modified its former decree, so as merely to remand the cause, and direct that the injunction be dismissed. 1 C. C. A. 668, 50 Fed. 785.

In Consolidated Piedmont Cable Co. v. Pacific Cable Ry. Co. (9th Circuit) 3 C. C. A. 566, 53 Fed. 382, and Same v. Same, 3 C. C. A. 570, 53 Fed. 385, on appeals from similar decrees, the cases were heard on the merits, both parties agreeing that the court had jurisdiction to review the cases on the merits, and the decrees were affirmed. On the decision of rehearings granted in both cases on the question of jurisdiction, the court said: "In the case of Iron Works v. Smith [no opinion filed] this point was specifically presented on a motion at this term of plaintiff to limit the appeal of the defendant to one from the order of the circuit court granting an injunction. The motion was denied, and the jurisdiction of the court to review the case on the merits affirmed." 7 C. C. A. 195, 58 Fed. 226.

In Watch Co. v. Robbins, 6 U. S. App. 275, 3 C. C. A. 103, and 52 Fed. 337, in the Sixth circuit, the decree below was the same as in the Munger and Atwood Cases. An appeal was allowed from that part of the decree granting the injunction. The parties to the appeal joined in an application to the court to hear and finally determine the cause on its merits. The court held, however, that it could not take jurisdiction, even by consent, of the whole controversy; that the appeal only brought up for review that part of the interlocutory decree relating to the injunction; that all other parts of the decree—such as those relating to the validity of the patent, its infringement, and the questions that may arise on the accounting ordered to ascertain damages and profits—had not yet left the jurisdiction of the trial court; and that the only question presented for determination was whether the decree for an infringement was providently granted, in the legal discretion of the trial court, which question involved only incidentally the question of the validity of the patent, and the infringement complained of. In its opinion the court referred to the first decision in the Atwood Case and to both decisions in the Munger Case. It considered that the last decision in the Munger Case indicated an opinion that the court had full jurisdiction on the merits, and, in view of this difference between the two circuits, certified the question to the supreme court for decision, under section 6 of the act creating the circuit court of appeals; but the certificate was dismissed, as defective, by the supreme court. See 148 U. S. 266, 13 Sup. Ct. 594. On a subsequent hearing of the appeal in the circuit court of appeals, that court, in affirming the decree

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below, said: "In looking into the record, however, to determine whether the discretion of the circuit court was properly exercised, we have found ourselves obliged to consider the validity of the patent and its infringement with the conclusion above stated. As the patent is valid, and it was infringed by the defendants, the court necessarily exercised proper discretion in granting the injunction appealed from, and its decree is affirmed." Watch Co. v. Robbins (6th Circuit) 12 C. C. A. 174, 64 Fed. 384.

The last-cited case was, however, expressly overruled by the same court in Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co. (6th Circuit) 19 C. C. A. 25, 72 Fed. 545. The court there held that where, on appeal from an interlocutory decree granting a perpetual injunction, and referring the cause to a master for an account, the court necessarily examines and determines the entire merits of the cause, its power to decree is not limited to the matter of the injunction alone, but extends to the whole merits, and its decision is final and conclusive on every point actually decided; and that, consequently, the court below has no power to modify in any respect a decree which is thus affirmed, but must give it full effect in the very terms of the decree of the appellate court.

On an appeal from an order granting an injunction pendente lite the circuit courts of appeals have refused to consider the entire case, and have limited the review to the question whether the injunction was erroneously or improvidently granted in the legal discretion of the court. American Paper Pail & Box Co. v. National Folding Box & Paper Co. (2d Circuit) 2 C. C. A. 165, 51 Fed. 229; Curtis v. Wheel Co. (2d Circuit) 7 C. C. A. 493, 58 Fed. 784; Consolidated Electric Storage Co. v. Accumulator Co. (3d Circuit) 5 C. C. A. 202, 55 Fed. 485; Hart v. Buckner (5th Circuit) 5 C. C. A. 1, 54 Fed. 925; Workingmen's Amalgamated Council v. U. S. (5th Circuit) 6 C. C. A. 258, 57 Fed. 85; Blount v. Société (6th Circuit) 3 C. C. A. 455, 53 Fed. 98; Industrial & Mining Guaranty Co. v. Electrical Supply Co. (6th Circuit) 7 C. C. A. 471, 58 Fed. 732.

In Curtis v. Wheel Co., in the Second circuit (7 C. C. A. 493, 58 Fed. 784), on appeal from an order granting a preliminary injunction in a patent case, the court said, "The vital question in this case is presented with approximate accuracy upon the face of the patent, and does not depend upon controverted questions of fact," and, holding the patent invalid, merely reversed the order of the court below.

In Davis Electrical Works v. Edison Electric Light Co. (1st Circuit) 8 C. C. A. 615, 60 Fed. 276, on appeal from a similar order, the court, per Putnam, C. J., citing the above cases, says: "If their position is correct, the result is that parties aggrieved by orders of circuit courts, under circumstances like these at bar, are disenabled from having 'the case' tried on appeal, and are cut down to a question whether or not the court below has acted within the limits of its discretion. This court has regarded the purposes of the section in question as highly remedial, and has not been disposed to clip its wings in any particular; but whether it will limit the exercise of its judicial powers as claimed by the appellees need not now be determined, because, in either view of the question, we should reach the same result. We are satisfied that the order of the circuit court was within the limits of its judicial discretion, and also, on examining the case de novo, that that discretion was correctly exercised." In concluding the opinion the court say: "Whatever order may be made on an appeal of this character ought not ordinarily to exclude the court below from its control over an ad interim injunction, and must not ordinarily be construed to have that effect. In the present case, the injunction order does not seem to have been superseded by the appeal. With this explanation, we adopt for the present the form of order which we find in other circuits. Order appealed from affirmed, with costs."

On appeal from an order granting a preliminary injunction against infringement of a patent, the court will not consider the merits, if complainant has brought himself within the rule as to a right to such an injunction. Jensen v. Norton (9th Circuit) 12 C. C. A. 608, 64 Fed. 662.

Where a temporary injunction, by its terms, is to continue in force "until the further order of the court," and subsequently a motion to dissolve is denied, and the injunction ordered to be continued in force, an appeal may be taken from this latter order. Chicago Dollar Directory Co. v. Chicago Directory Co. (7th Circuit) 13 C. C. A. 8, 65 Fed. 463.

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On an appeal from an order granting a preliminary injunction, the circuit court of appeals cannot, by reason of any action of the circuit court, be enabled to determine the matters in controversy. Its power is limited to a consideration of the correctness of the order from the same standpoint as that occupied by the court below; and the order will not be disturbed unless the discretion of the circuit court was improvidently exercised. Duplex Printing-Press Co. v. Campbell Printing-Press & Manuf'g Co. (6th Circuit) 16 C. C. A. 220, 69 Fed. 250.

The conclusion of the circuit court of appeals on a question of infringement of a patent on appeal from an order granting an injunction pendente lite will not preclude a different one on appeal from a decree entered after a hearing on bill, answer, and proofs. Davis Electrical Works v. Edison Electric Light Co. (1st Circuit) 8 C. C. A. 615, 60 Fed. 276.

On appeal from an interlocutory order appointing a receiver, and granting an injunction merely subsidiary to the receivership, the court cannot consider whether a receiver should have been appointed, but only whether, such appointment being proper, the injunction was a necessary or proper auxiliary remedy. Construction Co. v. Young (2d Circuit) 8 C. C. A. 231, 59 Fed. 721.

The rule that on an appeal from an interlocutory decree adjudging infringement of a patent, and directing an injunction and an accounting, the circuit court of appeals may go fully into the merits, and finally dispose of the whole case, is one of equitable convenience, to be applied only when the full record is brought before it, and when the decree below was entered after a full hearing. Marden v. Manufacturing Co. (1st Circuit) 15 C. C. A. 26, 67 Fed. 809.

The right given by this section is a privilege or option, and, whether availed of or not, it in no way affects or diminishes the right to appeal from the final decree to be rendered in the cause; and hence appellants thereunder may dismiss their appeal without prejudice to their right to take a subsequent appeal. Marden v. Manufacturing Co. (1st Circuit) 15 C. C. A. 26, 67 Fed. 809.

A complainant in a patent case has no right to a cross appeal, under section 7, in respect to so much of a decree as declares that certain claims of his patent are void, and that others are not infringed. Marden v. Manufacturing Co. (1st Circuit) 15 C. C. A. 26, 67 Fed. 809.

An order which merely denies a motion to dissolve a preliminary injunction is not appealable under this section. Dreutzer v. Land Co. (6th Circuit) 13 C. C. A. 73, 65 Fed. 642. But see, post, the amendment to the statute approved February 18, 1895.

See the act approved February 18, 1895, and note thereto, page xlii., infra.

[27] In Re Haberman Manuf'g Co., 147 U. S. 525, 13 Sup. Ct. 527, the supreme court, disapproving Société v. Blount, 51 Fed. 610, held that defendant is not entitled to a supersedeas as a matter of right, and it is within the discretion of the circuit court to grant or refuse the same, and that it has no jurisdiction to control by mandamus the discretion of the circuit court in such case. See the act approved February 18, 1895, page xlii., infra.

SEC. 8. That any justice or judge who, in pursuance of the provisions of this act, shall attend the circuit court of appeals held at any place other than where he resides, shall, upon his written certificate, be paid by the marshal of the district in which the court shall be held his reasonable expenses for travel and attendance, not to exceed ten dollars per day, and such payments shall be allowed the marshal in the settlement of his accounts with the United States.

SEC. 9. That the marshals of the several districts in which said circuit court of appeals may be held shall, under the direction of the attorney general of the United States, and with his approval, provide such rooms in the public buildings of the United States as may be necessary, and pay all incidental expenses of said court, including criers, bailiffs, and messengers: *provided, however*, that, in case proper rooms cannot be provided in such buildings, then the said marshals, with the approval

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of the attorney general of the United States, may, from time to time, lease such rooms as may be necessary for such courts; that the marshals, criers, clerks, bailiffs, and messengers shall be allowed the same compensation for their respective services as are allowed for similar services in the existing circuit courts.[28]

[28] This provision, taken in connection with Rev. St. § 823, allows the clerk to retain for his personal use, out of the fees of his office, at least $500 in addition to the $3,000 salary given by section 2. U. S. v. Morton (7th Circuit) 13 C. C. A. 151, 65 Fed. 204. See, also, the amendatory provision in the legislative appropriation act of July 31, 1894.

SEC. 10. That whenever, on appeal or writ of error or otherwise, a case coming directly from the district court or existing circuit court shall be reviewed and determined in the supreme court, the cause shall be remanded to the proper district or circuit court for further proceedings to be taken in pursuance of such determination.[29] And whenever, on appeal or writ of error or otherwise, a case coming from a circuit court of appeals shall be reviewed and determined in the supreme court, the cause shall be remanded by the supreme court to the proper district or circuit court for further proceedings in pursuance of such determination. Whenever, on appeal or writ of error or otherwise, a case coming from a district or circuit court shall be reviewed and determined in the circuit court of appeals, in a case in which the decision in the circuit court of appeals is final, such cause shall be remanded to the said district or circuit court for further proceedings to be there taken in pursuance of such determination.[30]

[29] The supreme court has no jurisdiction over an appeal from a judgment of the circuit court denying a petition for an allowance as solicitor out of a fund realized on a sale made under direction of such court, in execution of a mandate of the supreme court, where such appeal is taken after July 1, 1891. Mason v. Mining Co., 153 U. S. 361, 14 Sup. Ct. 847.

Where the supreme court, after affirming the jurisdiction of the circuit court, remands the cause, and directs the taking of an account, but without in any way passing upon the amount to be found due, the final decree of the circuit court, ascertaining such amount, is in no sense a mere execution of the judgment and mandate of the supreme court so that the same can be reviewed by mandamus. The proper method of review is by a new appeal; and where the new decree is rendered after July 1, 1891, and the cause does not fall within any of the provisions of section 5, such appeal must be to the circuit court of appeals. Nashua & L. R. Corp. v. Boston & L. R. Corp. (1st Circuit) 2 C. C. A. 543, 51 Fed. 929.

The previous statutory provisions giving the supreme court power, upon reversing a conviction, to remand with directions to render proper judgment, apply to criminal cases in which jurisdiction is conferred by this act. Ballew v. U. S., 16 Sup. Ct. 263, 160 U. S. 187.

If the circuit court mistakes or misconstrues the decree of the supreme court, and does not give full effect to the mandate, its action may be controlled either upon a new appeal, if a sufficient amount is involved, or by a writ of mandamus to execute the mandate. In re Sanford Fork & Tool Co., 16 Sup. Ct. 291, 160 U. S. 247.

If only the exceptions to the answer were set down for hearing and heard and passed upon by the circuit court, the supreme court, on reversing a decree which sustained the exceptions, and which, on defendant's refusal to plead further, granted the relief prayed for in the bill, cannot, without any consent or neglect by plaintiffs, deprive them of their right, under the general rules in equity, to file a replication. In re Sanford Fork & Tool Co., 16 Sup. Ct. 291, 160 U. S. 247.

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30 On appeal from a final decree, the circuit court of appeals has authority to go beyond a mere reversal, and enter such a decree as should have been rendered by the court below on the whole case, as shown by the record. Potter v. Beal (1st Circuit) 2 C. C. A. 60, 50 Fed. 860.

A judgment of reversal based solely on the ground that the trial court erred in not exercising its discretion on a motion for new trial requires, not the ordering of a new trial, but only a remanding of the case, for further proceedings from the point where the error was committed. Felton v. Spiro (6th Circuit) 78 Fed. 576, 24 C. C. A. 321.

Where a bill has been dismissed on demurrer for laches, because no sufficient explanation of the delay is pleaded, the appellate court may, in the absence of positive inequity, reverse the decree, and direct the allowance of an amendment to the bill. Hubbard v. Trust Co. (2d Circuit) 31 C. C. A. 520, 87 Fed. 51.

When a jury has been duly waived, and the case tried to the court on an agreed statement of facts, and the damages recoverable are a liquidated sum, the appellate court, on reversing a judgment for defendant, will not award a new trial, but will direct a judgment to be entered against defendant. Judgment (C. C. 1896) 73 Fed. 395, reversed. Rathbone v. Board of Com'rs of Kiowa County, Kan. (8th Circuit) 27 C. C. A. 477, 83 Fed. 125.

Plaintiffs brought an action in the United States circuit court, whose jurisdiction of the case rested wholly upon diverse citizenship, alleging in their complaint that they were residents of the state of Montana, but failing to allege that they were citizens thereof. The defendants answered. There was a protracted trial of the case, resulting in a verdict and judgment for the plaintiffs. The defendants moved for a new trial, upon numerous grounds. This motion was denied. The defendants then presented voluminous bills of exceptions, sued out a writ of error, and presented numerous assignments of error. At no stage of the proceedings, until the hearing in the circuit court of appeals, did the defendants suggest the defect in the allegations of citizenship, nor the want of jurisdiction; but, upon such hearing, they moved to dismiss the writ of error, and remand the cause, with instructions to dismiss it, for want of jurisdiction. It clearly appeared from the record, though not by direct averment, that the necessary diversity of citizenship existed. *Held* that, as the court was without jurisdiction, because of the defective averment, the cause would be remanded for appropriate action by the circuit court, which might, in its discretion, permit an amendment. Hunt v. Howes (5th Circuit) 21 C. C. A. 356, 74 Fed. 657.

There is no fixed rule governing the exercise by the circuit court of appeals of its equitable power to reserve leave to the court below to hear a motion by a defeated complainant to amend his pleading, but such leave will not be reserved where the complainant was defeated below on the merits, and made no application to amend before appeal, nor merely to permit the continuance of litigation, where there are no apparent equities sufficiently strong to justify it. Post v. Electrical Co. (1st Circuit) 32 C. C. A. 151, 89 Fed. 1.

A petition which avers the residence of the parties only cannot be amended on appeal so as to show citizenship; but the judgment may be reversed, and the cause remanded, with instructions to dismiss the suit, unless, by proper amendment below, diverse citizenship is made to appear. Insurance Co. v. Barker (5th Circuit) 32 C. C. A. 124, 88 Fed. 814.

Where a suit in equity for infringement of a patent had been pending 18 years, had survived two masters to whom it was referred, had been before one master for over 9 years, and finally resulted in a decree for nominal damages only, *held*, that the court, on appeal, though satisfied that the conclusions below were too sweeping in character, and that complainants were entitled to recover a substantial sum, would not remand the cause for further proceedings, but would itself, from the evidence in the record, ascertain the proper amount, and render a decree therefor. Tuttle v. Claflin (2d Circuit) 76 Fed. 227, 22 C. C. A. 138.

Money deposited in a district court as a tender by respondents in an admiralty cause remains in that court pending an appeal from a decree for libelants, and the circuit court of appeals has no control over the money, or over the district court in regard to it, except when the cause is reviewed and

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determined, and remanded for further proceedings. Mignano v. MacAndrews (2d Circuit) 4 C. C. A. 4, 56 Fed. 300.

A motion for mandamus from an appellate court to correct an alleged disobedience of its mandate will be denied where the record on appeal does not constitute the entire record in the lower court, and does not present important facts necessary to the determination of the question of repugnancy between the mandate and the order made under it. In such case the proper remedy is an appeal. In re Postal Tel. Cable Co. (7th Circuit) 85 Fed. 853, 29 C. C. A. 456.

A new question arising in the trial court in proceedings subsequent to the mandate of an appellate court, and not included therein, may be the subject of another appeal. Laidlaw v. Navigation Co. (9th Circuit) 81 Fed. 876, 26 C. C. A. 665.

SEC. 11. That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals, under the provisions of this act, shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed:[31] *provided, however*, that in all cases in which a lesser time is now by law limited for appeals or writs of error such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the circuit courts of appeals. And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals;[32] including all provisions for bonds or other securities to be required and taken on such appeals and writs of error; and any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States, respectively.

[31] To give the circuit court of appeals jurisdiction of a writ of error, the writ must be issued and filed with the court below within the time prescribed by law, and this requirement cannot be waived by the parties. Coulliette v. Thomason (5th Circuit) 1 C. C. A. 675, 50 Fed. 787; Stevens v. Clark (7th Circuit) 10 C. C. A. 379, 62 Fed. 321; Hamilton v. Brown (5th Circuit) 3 C. C. A. 639, 53 Fed. 753; White v. Bank (8th Circuit) 17 C. C. A. 621, 71 Fed. 97; Condon v. Trust Co. (8th Circuit) 20 C. C. A. 110, 73 Fed. 907. When the writ is allowed within the six months, but is not actually issued by the clerk until after the expiration thereof, it will be dismissed. U. S. v. Baxter (8th Circuit) 2 C. C. A. 410, 51 Fed. 624. When the last day of the six months falls on Sunday, the appeal cannot be taken, or writ of error sued out, on any subsequent day. Johnson v. Meyers (8th Circuit) 4 C. C. A. 399, 54 Fed. 417.

Parties cannot confer jurisdiction on the circuit court of appeals to review a judgment six months after its entry by the voluntary appearance of necessary parties to the appeal. Dodson v. Fletcher (8th Circuit) 79 Fed. 129, 24 C. C. A. 466.

An appeal to the circuit court of appeals may be perfected notwithstanding the security has not been given within six months after the entry of the decree sought to be reviewed. Wickelman v. A. B. Dick Co. (2d Circuit) 85 Fed. 851, 29 C. C. A. 436.

R. and S., alleging themselves to compose the firm of W. & Co., applied to the circuit court of appeals for an order staying the execution of six several decrees rendered in a cause in the circuit court, on the ground that they had taken an appeal and given bond. The record did not disclose that they were

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parties or privies to the suit, although it showed that certain parties had been allowed an appeal from a part of the decrees, and that later, and after the term, an appeal bond naming W. & Co. as a principal had been approved, reciting that W. & Co., among others, "have prosecuted an appeal to reverse the decree." *Held*, that as the bond did not show the names of the individuals composing the firm, nor that W. & Co. was a party or privy, nor that it was approved during the term, nor any particular decree appealed from, nor any citation, the applicants had not taken any appeal, nor given any such bond as to operate as a supersedeas, and that the order applied for should be denied. In re Woerishoffer (5th Circuit) 21 C. C. A. 175, 74 Fed. 915.

The mere filing of the petition for appeal and the assignments of error in the clerk's office within the statutory period is not a sufficient perfection of appeal. Green v. City of Lynn (1st Circuit) 31 C. C. A. 248, 87 Fed. 839.

Where the record does not show that the original writ of error sued out in the circuit court of appeals has been formally filed in the trial court, even though it was in fact delivered to and lodged with the clerk, the appellate court is without jurisdiction. Insurance Co. v. Phinney (9th Circuit) 76 Fed. 617, 22 C. C. A. 425.

A writ of error is not filed in the trial court till it is indorsed as filed by the clerk. Gilbert, Circuit Judge, dissenting. Insurance Co. v. Phinney (9th Circuit) 76 Fed. 617, 22 C. C. A. 425.

In United States Nat. Bank v. First Nat. Bank (8th Circuit) 79 Fed. 296, 24 C. C. A. 597, however, it was *held* that a writ of error, which has been allowed, served, and returned to the appellate court with the transcript of the proceedings in the trial court, will not be dismissed because the clerk of the trial court has inadvertently failed to make an indorsement of its filing on the writ itself.

Where a writ of error was duly issued and filed by the clerk of the circuit court, but no notation of its filing made, and by mistake a copy was attached to the transcript instead of the original, on production of the original, with the citation, and acknowledgment of service thereon, both certified by the clerk, they may be made or recognized as part of the record, or the want of a seal upon the copy may be supplied by an impression of the seal of the appellate court. Burnham v. Railway Co. (7th Circuit) 30 C. C. A. 594, 87 Fed. 168.

As power to amend a writ of error, under Rev. St. § 1005, is conferred by this section on the circuit court of appeals, that court may affix its seal to such a writ, formal in all respects save absence of a seal; and the operation of such a writ is not defeated by the fact that it is not returned attached to the transcript of the record, where it is returned on the day the transcript is filed, indorsed as executed by sending the transcript as commanded, for the defect may be amended. Cotter v. Railroad Co. (6th Circuit) 10 C. C. A. 35, 61 Fed. 747.

The jurisdiction of the court of appeals attaches upon the filing of the writ of error in the office of the clerk of the circuit court, and is not defeated by irregularity in the transcript or in its certification. Burnham v. Railway Co. (7th Circuit) 30 C. C. A. 594, 87 Fed. 168.

See note 14 to rule 14, page clviii., infra; and also the notes to rule 16, page clix., infra.

Where, in accordance with the local practice, a motion for new trial is made after judgment, the judgment does not become effective, for the purposes of a writ of error, until such motion is disposed of, and the time limited by statute for the allowance of an appeal or a writ to review the judgment runs from that date. Altenberg v. Grant (6th Circuit) 83 Fed. 980, 28 C. C. A. 244; Kingman & Co. v. Western Mfg. Co., 18 Sup. Ct. 786, 170 U. S. 675; Alexander v. U. S. (9th Circuit) 57 Fed. 828, 6 C. C. A. 602.

In respect to the time allowed for taking an appeal, a final decree of foreclosure and sale takes effect from the date of its entry, and not from the date of appointment of a master to make the sale. Duncan v. Railroad Co. (C. C.) 88 Fed. 840.

An order of court approving and confirming the clerk's accounts covering the disbursements of the proceeds of a foreclosure sale of a railroad becomes a final decree on the adjournment of the term, and can be reviewed only by an

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appeal taken within six months. Coe v. Railroad Co. (5th Circuit) 85 Fed. 489, 29 C. C. A. 292.

An order signed by the judge, and entered by the clerk, finally dismissing certain defendants from the case, and directing the costs to be taxed, is a final, appealable order, though the amount of the costs is not inserted therein; and a writ of error taken more than six months thereafter must be dismissed, although a more formal judgment was afterwards entered, less than six months before the allowance of the writ. Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co. (2d Circuit) 84 Fed. 213, 28 C. C. A. 481.

A bill of exceptions, after reciting the facts upon which the court directed a verdict, concluded: "Forasmuch as the facts aforesaid and the decision of the court thereon do not appear of record, plaintiffs pray that this, their bill of exceptions, may be allowed," etc. *Held* not to imply that judgment had been rendered, and a writ of error within the time limited after a formal judgment subsequently entered was taken in time. Marks v. Railroad Co. (9th Circuit) 76 Fed. 941, 22 C. C. A. 630.

[32] This provision does not put in force in the circuit court of appeals the provision of the judiciary act of 1875 (18 Stat. 315) limiting the supreme court in admiralty appeals to a review of questions of law apparent on the record or presented by bill of exceptions; and on such appeals, both from the district court and from the circuit court (in respect to the cases pending therein at the time of the act), the circuit court of appeals will try the case de novo. Pratt v. The Havilah (2d Circuit) 1 C. C. A. 77, 48 Fed. 684; The State of California (9th Circuit) 1 C. C. A. 224, 49 Fed. 172; The Philadelphian (1st Circuit) 9 C. C. A. 54, 60 Fed. 423; The Coquitlam (9th Circuit) 23 C. C. A. 438, 77 Fed. 744.

But see The Beeche Dene (5th Circuit) 5 C. C. A. 208, 55 Fed. 526.

Quære, whether the act of February 16, 1875 (18 Stat. 315), requiring circuit courts to find the facts in admiralty cases, and limiting the review of the cause on appeal to the supreme court to the questions of law arising on the record, applies to causes decided by the district courts, and reviewed on appeal by the circuit courts of appeal, under the judiciary act of 1891. But, in any event, the cause goes to the circuit court of appeals for review rather than for trial. Fuel Co. v. McBrier (8th Circuit) 28 C. C. A. 466, 84 Fed. 495.

The circuit courts of appeals may review findings of fact in admiralty cases, but will follow the conclusions of the trial judge unless based on evidence manifestly insufficient. The Brandywine (4th Circuit) 31 C. C. A. 187, 87 Fed. 652.

Writs of error from the circuit court of appeals to the circuit and district courts are sued out under the same practice and regulations as in cases of writs from the supreme court. Cotter v. Railroad Co. (6th Circuit) 10 C. C. A. 35, 61 Fed. 747. Such writs may be issued from the clerk's office of the circuit court in which the cause was tried. Railroad Co. v. Amato (2d Circuit) 1 C. C. A. 468, 49 Fed. 881.

The provisions of law limiting the jurisdiction of the supreme court to cases involving $2,000 and $5,000, respectively, being expressly repealed by section 14, they are not transferred to the circuit court of appeals as "provisions of law now in force"; and there is no limitation on the jurisdiction of that court in respect to the amount in controversy. Railroad Co. v. Amato (2d Circuit) 1 C. C. A. 468, 49 Fed. 881; Courtney v. President, etc. (8th Circuit) 1 C. C. A. 249, 49 Fed. 309; McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. 118.

The practice and the rules of the state courts do not apply to proceedings taken in the circuit courts for the purpose of review in the circuit court of appeals. Railroad Co. v. McGee (4th Circuit) 2 C. C. A. 81, 50 Fed. 906.

The practice and rules in the circuit courts embracing the preparation, settling, and signing of bills of exception are not within the "practice and forms and modes of proceeding" required by Rev. St. § 914, to conform as near as may be to those existing in like causes in the courts of record of the state. Prichard v. Budd (4th Circuit) 76 Fed. 710, 22 C. C. A. 504.

While the practice act of Arkansas, regulating the practice of state courts of original jurisdiction, is obligatory on the federal courts held in the state, and also (by virtue of 26 Stat. 81) in the Indian Territory, yet the rules of

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practice in the supreme court of that state are not adopted by the circuit court of appeals in cases coming from either the state or the territory. McClellan v. Pyeatt (8th Circuit) 1 C. C. A. 613, 50 Fed. 686.

The circuit court of appeals cannot take judicial notice of what may appear upon the records of the district and circuit courts within the circuit for which it sits, but is limited to the matters brought into its own records in the usual manner of preparing appeals and writs of error. Fitzgerald v. Evans (8th Circuit) 1 C. C. A. 307, 49 Fed. 426; In re Manderson (3d Circuit) 2 C. C. A. 490, 51 Fed. 501.

On an appeal to the circuit court of appeals from a decree in proceedings to enforce an order of the interstate commerce commission, the decree of the circuit court is not superseded; but, if an appeal be taken to the supreme court from the decree of the circuit court of appeals, the latter decree is superseded, so that the decree of the circuit court remains in force in any event. Railroad Co. v. Behlmer, 18 Sup. Ct. 502, 169 U. S. 644.

In general a circuit court of appeals will not, pending an appeal, suspend an injunction, previous to the hearing on the merits, after the trial judge has refused to grant a supersedeas. American Strawboard Co. v. Indianapolis Water Co. (7th Circuit) 26 C. C. A. 470, 81 Fed. 423.

On appeal from an order granting a preliminary injunction in a patent case, where the court below bases its action entirely upon a prior decision in another circuit, sustaining the patent, the circuit court of appeals is not itself constrained to adopt the rulings of such other circuit court, but is at liberty to re-examine the same, and dispose of the questions of law conformably to its own convictions, giving to the former adjudication only such weight as, in its own judgment, the same is entitled to. Thomson-Houston Electric Co. v. Hoosick Ry. Co. (2d Circuit) 82 Fed. 461, 27 C. C. A. 419. See note at the end of this case.

A circuit court of appeals, when reviewing a preliminary injunction granted on the strength of a prior decision by a circuit court of appeals of another circuit, is not precluded, by such prior decision, from inquiring into the validity of the patent on the merits. Stover Mfg. Co. v. Mast, Foos & Co. (7th Circuit) 32 C. C. A. 231, 89 Fed. 333.

An appeal taken to the circuit court of appeals from a decree of the circuit court, entered in accordance with the mandate of the former court upon a previous appeal, will be dismissed, even though an appeal lie to the supreme court from the decision of the circuit court of appeals. Merrill v. Bank (5th Circuit) 78 Fed. 208, 24 C. C. A. 63.

SEC. 12. That the circuit courts of appeals shall have the powers specified in section seven hundred and sixteen of the Revised Statutes of the United States.[34]

[34] Under the authority "to issue all writs not specifically provided for by statute which may be necessary for the exercise of its jurisdiction, and agreeable to the usages and principles of law," as provided in Rev. St. § 716, a writ of certiorari cannot be made to serve the same purpose as an appeal or writ of error, except as provided in section 6. American Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 13 Sup. Ct. 758.

A writ of habeas corpus cannot perform the office of a writ of error or an appeal. Sternaman v. Peck (2d Circuit) 26 C. C. A. 214, 80 Fed. 883; Price v. McCarty (2d Circuit) 32 C. C. A. 162, 89 Fed. 84.

It seems that where a circuit or district court refuses to hear a case for want of jurisdiction, and the question thus decided may be heard on a certificate in the supreme court under section 5, it would not be within the power of the circuit court of appeals by mandamus to compel such circuit or district court to take jurisdiction, but such power is vested in the supreme court whenever remedy by appeal or writ of error or certificate is inadequate. U. S. v. Swan (6th Circuit) 13 C. C. A. 77, 65 Fed. 647.

A circuit court of appeals cannot issue a writ of mandamus except in a case of which it has already acquired jurisdiction by other proceedings. U. S. v. Judges of United States Court of Appeals (8th Circuit) 85 Fed. 177, 29 C. C. A. 78.

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SEC. 13. Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the supreme court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, under this act.[35]

[35] As the act of March 1, 1895 (28 Stat. 693), creating a court of appeals for the Indian Territory contained no clause saving the jurisdiction of the circuit court of appeals for the eighth circuit over pending appeals and writs of error, the latter court has no power to hear and determine any cases coming from the United States court in the Indian Territory which were pending and undetermined on its docket at the date of that act. Gowen v. Bush (8th Circuit) 18 C. C. A. 572, 72 Fed. 299; Scott v. Hamner (8th Circuit) 18 C. C. A. 565, 72 Fed. 289. But see the act approved February 8, 1896, on page xlv., infra.

In the act of March 1, 1895, creating a court of appeals for the Indian Territory, and giving it full jurisdiction, civil and criminal, the provision of section 11, that "writs of error and appeals from the final decision of said appellate court shall be allowed, and may be taken to the circuit court of appeals for the Eighth judicial circuit, in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States," conferred upon that court full appellate jurisdiction, including that in cases of infamous crimes, which was theretofore vested in the United States supreme court. Harless v. U. S. (8th Circuit) 31 C. C. A. 397, 88 Fed. 97.

The act of March 1, 1895 (2 Supp. Rev. St. p. 392), which extended the jurisdiction of the United States courts in the Indian Territory to capital cases, having also created the court of appeals in that territory, with power to entertain appeals and writs of error, the jurisdiction of such court to review judgments in capital cases is exclusive, and the supreme court has no appellate jurisdiction of such cases. Brown v. U. S., 19 Sup. Ct. 56; Curley v. Same, Id.

SEC. 14. That section six hundred and ninety-one of the Revised Statutes of the United States, and section three of an act entitled "An act to facilitate the disposition of cases in the supreme court, and for other purposes," approved February sixteenth, eighteen hundred and seventy-five, be, and the same are hereby, repealed;[36] and all acts and parts of acts relating to appeals or writs of error, inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act, are hereby repealed.[37]

[36] This repeal affects only the jurisdictional amounts specified, and does not do away with the necessity for a final judgment as a basis of the appeal. McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. 118.

[37] Section 16 of the interstate commerce law, as amended by the act of March 2, 1889, which gives to the interstate commerce commission a summary proceeding in the circuit court to enforce its orders, was repealed by the above act in so far as it allowed an appeal direct to the supreme court when the matter in dispute exceeded $2,000, and the appeal should now be taken to the circuit court of appeals. Interstate Commerce Commission v. Atchison, T. & S. F. R. Co., 149 U. S. 264. 13 Sup. Ct. 837.

Rev. St. §§ 651, 697, authorizing a certificate of division of opinion of the circuit court in criminal cases, in order to obtain the opinion of the supreme court, were repealed by this provision, in connection with the provisions of sections 5 and 6. U. S. v. Rider, 163 U. S. 132, 16 Sup. Ct. 983; Same v. Hewecker, 164 U. S. 46, 17 Sup. Ct. 18.

Rev. St. U. S. § 763, giving circuit courts appellate jurisdiction in habeas corpus cases, was abrogated by this act. Webb v. York (8th Circuit) 21 C. C. A. 65, 74 Fed. 753.

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SEC. 15. That the circuit courts of appeals, in cases in which the judgments of the circuit courts of appeals are made final by this act,[38] shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts[39] of the several territories as by this act they may have to review the judgments, orders, and decrees of the district court and circuit courts; and for that purpose the several territories shall, by orders of the supreme court, to be made from time to time, be assigned to particular circuits.[40]

Approved March 3, 1891.

[38] The circuit courts of appeals have no jurisdiction over judgments and decrees of the supreme courts of the territories except in the classes of cases in which the judgments of the circuit courts of appeals are made final by section 6. Shute v. Keyser, 149 U. S. 649, 13 Sup. Ct. 960; Mining Co. v. Ripley, 151 U. S. 79, 14 Sup. Ct. 236, affirming (8th Circuit) 3 C. C. A. 388, 53 Fed. 7; Badaracco v. Cerf (8th Circuit) 3 C. C. A. 491, 53 Fed. 169. In other cases, where the matter in dispute, exclusive of costs, exceeds the sum of $5,000, the supreme court has jurisdiction. Id.

The decisions of the circuit courts of appeals are not made "final" by section 6 in cases of infamous crimes, and therefore those courts have no jurisdiction, under section 15, to review the judgments of territorial supreme courts in such cases. Folsom v. U. S., 160 U. S. 121, 16 Sup. Ct. 222.

[39] The appellate jurisdiction of the circuit court of appeals over territorial courts is limited to the supreme courts of the territories. In re Boles (8th Circuit) 1 C. C. A. 48, 48 Fed. 75.

The district court of Alaska is in effect the supreme court of that territory, so as to authorize the review of its judgments by the circuit court of appeals of the ninth circuit. The Coquitlam v. U. S., 163 U. S. 346, 16 Sup. Ct. 1117. See the act approved July 8, 1898, page xlvii., infra.

[40] A circuit court of appeals has no jurisdiction to award a writ of habeas corpus, to be served in a territory assigned to its circuit under this section, to secure the release of a person there held in custody. In re Boles (8th Circuit) 1 C. C. A. 48, 48 Fed. 75.

Joint resolution to provide for the organization of the circuit courts of appeals.

Resolved by the senate and house of representatives of the United States of America, in congress assembled, that the first meeting of the several circuit courts of appeals mentioned in the act of congress passed at this present session, entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," shall be held on the third Tuesday in June, A. D. eighteen hundred and ninety-one; and if, from any casualty, the first meeting of any of said courts shall fail to be so held on that day, the first meeting of any such court, so failing to be held, shall be held on such day subsequent thereto as the chief justice, or any justice of the supreme court of the United States assigned to such circuit, shall direct; *and be it further resolved*, that nothing in said act shall be held or construed in any wise to impair the jurisdiction of the supreme court or any circuit court of the United States[41] in any case now pending before it, or in respect of any case wherein the writ of error or the appeal shall have been sued out or taken to any of said courts before the first day of July, Anno Domini eighteen hundred and ninety-one.[42]

Approved March 3, 1891.

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[41] This clause does not prevent the circuit court of appeals from reviewing causes pending in the circuit courts at the date of the act, although they involved less than $5,000, and for that reason were not before reviewable in any court. Making the judgment reviewable does not impair the court's jurisdiction. Railroad Co. v. Amato (2d Circuit) 1 C. C. A. 468, 49 Fed. 881.

[42] This provision operated to preserve the appellate jurisdiction of the supreme court in pending cases until July 1, 1891, so that from March 3d until that date a party might carry his cause either to the supreme court or the circuit court of appeals. Railroad Co. v. Bennett (6th Circuit) 1 C. C. A. 392, 49 Fed. 598; Wauton v. De Wolf, 142 U. S. 138, 12 Sup. Ct. 173.

In a case where federal jurisdiction depends upon diverse citizenship, a writ of error from the supreme court to the circuit court, filed after July 1, 1891, will be dismissed, notwithstanding it was allowed by the court, and a supersedeas filed and approved before such date. Cincinnati Safe & Lock Co. v. Grand Rapids Safety Deposit Co., 146 U. S. 54, 13 Sup. Ct. 13.

The supreme court will refuse to redocket a cause appealed from the circuit court in which federal jurisdiction depended upon diverse citizenship, which was once dismissed, and in which a new appeal was allowed after July 1, 1891. Wauton v. De Wolf, 142 U. S. 138, 12 Sup. Ct. 173.

A decree will not take final effect for the purposes of an appeal to the supreme court until after a rehearing, duly entertained and filed, is disposed of. Vorhees v. Manufacturing Co., 151 U. S. 135, 14 Sup. Ct. 295.

This act does not authorize a review by the supreme court on appeal or writ of error of a decree filed in October, 1891, dismissing a bill praying for a mandatory injunction to compel certain railroad companies to afford the complainants the same facilities as are afforded to any other connecting road, and for such other relief as may be deemed equitable. Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co., 16 Sup. Ct. 189, 159 U. S. 698.

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AMENDMENTS.

An act to amend the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March third, eighteen hundred and ninety-one.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the seventh section of the act of congress entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March third, eighteen hundred and ninety-one, be, and the same is hereby, amended to read as follows:

"That where, upon a hearing in equity in a district court or a circuit court, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree or an application to dissolve an injunction shall be refused in a case in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve an injunction to the circuit court of appeals:[43] Provided, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal: And provided further, That the court below may in its discretion require as a condition of the appeal, an additional injunction bond."

Approved February 18, 1895.

[43] An order so modifying an interlocutory decree for a broad perpetual injunction against infringement of a patent as to permit defendant to manufacture and sell, for a limited time, certain infringing machines, is an order dissolving pro tanto the original injunction, and is consequently an appealable interlocutory decree, in the meaning of this section. Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co. (6th Circuit) 19 C. C. A. 25, 72 Fed. 545.

A decree, made after final hearing on the merits, declaring infringement of a trade-mark, awarding a perpetual injunction, and referring the cause to a master for an accounting, is not an appealable final decree, but is an interlocutory decree, from which an appeal will lie within 30 days, under this section. Raymond v. Baking-Powder Co. (7th Circuit) 76 Fed. 465, 22 C. C. A. 276.

This act authorizes appeals not only from orders granting, continuing, etc., preliminary injunctions, but also from interlocutory decrees made after full hearing on the merits, granting an injunction, and referring the cause to a master to ascertain profits and damages. Lockwood v. Wickes (8th Circuit) 75 Fed. 118, 21 C. C. A. 257.

A decree adjudging that complainant is the owner of the patents sued on, that the claims of said patents, or some of them, are valid, and that defendants have infringed them, and granting a perpetual injunction, is appealable

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as a final decision upon the matters so adjudicated, under section 6 of the act establishing the circuit courts of appeal, and not as an interlocutory decree, under amended section 7, although the decree further refers the cause to a master for an accounting of profits, and expressly reserves the question of costs. Per Showalter, Circuit Judge (Woods, Circuit Judge, contra). Standard Elevator Co. v. Crane Elevator Co., 22 C. C. A. 549, 76 Fed. 767.

The assembling of a prayer for an unnecessary injunction with a prayer for modification of a decree or order will not warrant a review of the decree or order, when a direct appeal therefrom is unauthorized by law. Safe-Deposit Co. v. Dickson (7th Circuit) 78 Fed. 205, 24 C. C. A. 60.

But an appeal from an interlocutory decree granting an injunction may be taken from the whole decree. It need not be restricted to the part granting the injunction. Smith v. Iron Works, 17 Sup. Ct. 407, 165 U. S. 518, 41 L. Ed. 810; Norton v. Wheaton, Id.

And where a decree appoints a receiver for a corporation, orders its officers to deliver the property into the receiver's hands, and enjoins them from interfering further with it, the injunction, while incidental to the appointment of the receiver, forms a substantial part of the decree, and is therefore appealable. Lake Nat. Bank v. Wolfeborough Sav. Bank (1st Circuit) 78 Fed. 517, 24 C. C. A. 195.

And in such case the propriety of the entire order or decree may be considered, notwithstanding the statutes do not provide for an appeal from an order appointing a receiver. United States Rubber Co. v. American Oak Leather Co. (7th Circuit) 82 Fed. 248, 27 C. C. A. 118; Metropolitan Nat. Bank v. Same, Id.

An appeal will not lie from an order appointing a receiver, however, merely because it contains the usual mandatory direction, in the nature of an injunction, requiring the defendant, its officers, agents, and employés, to deliver to the receiver the property in their hands. Highland Ave. & B. R. Co. v. Columbian Equipment Co., 18 Sup. Ct. 240, 168 U. S. 627.

In a suit in which an appeal would lie to the circuit court of appeals from a final decree, an appeal may be taken from an order granting a temporary injunction and appointing a receiver, even though the jurisdiction of the circuit court is also involved. In re Tampa Suburban R. Co., 18 Sup. Ct. 177, 168 U. S. 583.

And even though the question of the lower court's jurisdiction is the only question involved. Lake Nat. Bank v. Wolfeborough Sav. Bank (1st Circuit) 78 Fed. 517, 24 C. C. A. 195.

However, an order dissolving a temporary injunction, which under the circumstances is harmless, will not be reviewed in order to decide a question of jurisdiction. Lake Street El. R. Co. v. Farmers' Loan & Trust Co. (7th Circuit) 77 Fed. 769, 23 C. C. A. 448.

And where the question as to the jurisdiction of the circuit court was of a grave and vital character, *held*, that the circuit court of appeals would not then determine it, but would decide the question of the propriety of the injunction on its merits, and leave the jurisdictional question until after final decree below, so that the parties, if they so desired, might take it direct to the supreme court. Carson v. Combe (5th Circuit) 86 Fed. 202, 29 C. C. A. 660.

The circuit court of appeals has no jurisdiction of an appeal from an interlocutory order granting a preliminary injunction when constitutional questions are involved. Town of Westerly v. Westerly Waterworks (1st Circuit) 76 Fed. 467, 22 C. C. A. 278; Same v. Seamen's Friend Soc., Id.

The circuit court of appeals, on an appeal from an interlocutory decree of the circuit court granting an injunction, may consider and decide the case on its merits. Smith v. Iron Works, 17 Sup. Ct. 407, 165 U. S. 518, 41 L. Ed. 810; Norton v. Wheaton, Id.; In re Tampa Suburban R. Co., 18 Sup. Ct. 177, 168 U. S. 583.

On appeal from an order made on ex parte affidavits, granting a preliminary injunction, the court may, if of opinion that the bill has no equity to support it, reverse the order and direct the dismissal of the bill. Stover Mfg. Co. v. Mast, Foos & Co. (7th Circuit) 32 C. C. A. 231, 89 Fed. 333.

Upon an appeal from an order granting a preliminary injunction, where the question involved is one of law, determining the ultimate rights of the par-

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ties, and is fully presented by the record, the court of appeals will decide the same upon the merits, and render a decree finally disposing of the case. City of Knoxville v. Africa (6th Circuit) 77 Fed. 501, 23 C. C. A. 252; Citizens' Ry. Co. v. Same, Id.

But the circuit court of appeals will not determine the cause on its merits, when the rights of the parties can be made to appear only by full proof of the facts. City of Knoxville v. Africa (6th Circuit) 77 Fed. 501, 23 C. C. A. 252; Citizens' Ry. Co. v. Same, Id.; Clark v. McGhee (5th Circuit) 87 Fed. 789, 31 C. C. A. 321.

On appeal from an order relating to a preliminary injunction, the decision of the judge below will not be reversed unless it appears from a consideration of the case, as presented to him, that his legal discretion to grant or withhold the injunction was improvidently exercised. Thompson v. Nelson (6th Circuit) 18 C. C. A. 137, 71 Fed. 339; City of Knoxville v. Africa (6th Circuit) 23 C. C. A. 252, 77 Fed. 501; Bradshaw v. Bank (7th Circuit) 23 C. C. A. 578, 77 Fed. 932; Southern Pac. Co. v. Earl (9th Circuit) 27 C. C. A. 185, 82 Fed. 690; Ritter v. Ulman (4th Circuit) 24 C. C. A. 71, 78 Fed. 222.

On appeal from an order granting a preliminary injunction on the strength of a prior decision by the circuit court against another party, such prior decision will be given the same weight which it should have before the circuit court, in the absence of some controlling reason for disregarding it. American Paper Pail & Box Co. v. National Folding-Box & Paper Co. (1892) 51 Fed. 229, 2 C. C. A. 165, followed. 79 Fed. 795 (C. C. 1897) affirmed. Fastener Co. v. Littauer (2d Circuit) 84 Fed. 164, 28 C. C. A. 133, 80 Fed. 712.

But the power of the circuit court of appeals to review an order granting or refusing a preliminary injunction cannot be hampered or restricted by any prior ruling of the circuit court, involving the same question or any phase of the question, though made in an order from which a direct appeal is not allowed, especially where such ruling relates to the jurisdiction of the court. Lake Street El. R. Co. v. Farmers' Loan & Trust Co. (7th Circuit) 77 Fed. 769, 23 C. C. A. 448.

On appeal from an order granting a preliminary injunction in a patent case, where the court below bases its action entirely upon a prior decision in another circuit, sustaining the patent, the circuit court of appeals is not itself constrained to adopt the rulings of such other circuit court, but is at liberty to re-examine the same, and dispose of the questions of law conformably to its own convictions, giving to the former adjudication only such weight as, in its own judgment, the same is entitled to. Thomson-Houston Electric Co. v. Hoosick Ry. Co., 27 C. C. A. 419, 82 Fed. 461. See the note at the end of this case.

Where a preliminary injunction has been granted solely on the strength of a decision in another circuit, and thereafter the judgment in the latter case is reversed and vacated by the circuit court of appeals, and the bill ordered to be dismissed, even because of an accord and satisfaction, this so changes the status of affairs that the preliminary injunction will be dissolved on an appeal therefrom. Order, Printing-Press Co. v. Prieth (1897) 77 Fed. 976, reversed. Prieth v. Manufacturing Co. (3d Circuit) 80 Fed. 539, 25 C. C. A. 624.

It is not enough to justify the circuit court of appeals in reversing an order of the circuit court refusing a preliminary injunction to stay a foreclosure sale, in a suit to vacate the decree of foreclosure, that the complaint probably contains sufficient averments to warrant the relief prayed for; but it must be made to appear that there are reasonable grounds for believing that the material allegations of the bill, tending to show fraud and collusion, are true, and that they will probably be established on the final hearing. Foley v. Safe-Deposit Co. (8th Circuit) 21 C. C. A. 78, 74 Fed. 759.

When the circuit court, after final hearing, has made an interlocutory order for a perpetual injunction, it has concluded the matter so far as it is concerned; and, if the defendant fail to appeal within the 30 days allowed by the statute, his only remedy is by appeal after final decree. He cannot thereafter move the court to dissolve the injunction, and then take an appeal from its order denying his motion. Appeal (C. C. 1896) 77 Fed. 181, dismissed. Baker v. Walter Baker & Co. (4th Circuit) 83 Fed. 3, 27 C. C. A. 396.

Where a patent is sustained after a full hearing on the merits, and the tak-

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ing of an account would involve little labor and expense, complainant should be allowed to waive his right to an injunction until the decree becomes final, so as to deprive defendant of an opportunity to appeal from the interlocutory decree. Lockwood v. Wickes (8th Circuit) 75 Fed. 118, 21 C. C. A. 257.

An appeal in a patent case from an interlocutory decree awarding an injunction and accounting must be dismissed when it appears that the patent has expired pending the appeal. Lockwood v. Wickes (8th Circuit) 75 Fed. 118, 21 C. C. A. 257.

An appellant cannot of right dismiss his own appeal; and, when an appeal is dismissed on his motion, he is not entitled, in the absence of special equitable considerations, to have the order expressed to be without prejudice; but where an appeal from an interlocutory order granting a preliminary injunction was so dismissed, the order may state the fact that the dismissal was before any hearing on the merits. Appeal, Tannage Patent Co. v. Donallan, 75 Fed. 287 (1896), dismissed. Donallan v. Patent Co. (1st Circuit) 79 Fed. 385, 24 C. C. A. 647.

A circuit court having ordered an injunction to issue, an appeal was taken, and thereupon it directed that the injunction should not issue until further order. Application was then made to the circuit court of appeals for an original order directing the court to vacate this latter order. *Held*, that the appellate court could give no such directions, as its jurisdiction is only appellate, and it can act upon the court below only by mandate. North Bloomfield Gravel Min. Co. v. U. S. (9th Circuit) 83 Fed. 2, 27 C. C. A. 395.

The supreme court will not issue a writ of certiorari to review the action of a circuit court in granting a preliminary injunction and appointing a receiver, on the ground that the orders were made by a judge outside the limits of his circuit, since there is an adequate remedy by appeal to the circuit court of appeals. In re Tampa Suburban R. Co., 18 Sup. Ct. 177, 168 U. S. 583.

An act to extend the jurisdiction of the United States circuit court of appeals, Eighth circuit, over certain suits now pending therein on appeal and writ of error from the United States court in the Indian Territory.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that the jurisdiction of the United States circuit court of appeals for the Eighth judicial circuit be, and is hereby, extended to all suits at law or equity now pending therein upon writ of error to or appeal from the United States court in the Indian Territory in all cases wherein such writ of error or appeal would have vested jurisdiction in said circuit court of appeals but for the act of congress approved March first, eighteen hundred and ninety-five, entitled "An act to provide for the appointment of additional judges of the United States court in the Indian Territory, and for other purposes." [44]

Approved February 8, 1896.

[44] See the notes to section 13 of the act creating the circuit courts of appeals, page xxxix., supra.

An act to withdraw from the supreme court jurisdiction of criminal cases not capital, and confer the same on the circuit courts of appeals.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, That so much of section five of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March third, eighteen hundred and ninety one, as reads "in cases of conviction of a capital or otherwise infamous crime," be amended by striking out

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the words "or otherwise infamous," so that the same will read "in cases of conviction of a capital crime;" and that appeals or writs of error may be taken from the district courts or circuit courts to the proper circuit court of appeals in cases of conviction of an infamous crime not capital:[45] provided, that no case now pending in the supreme court or in which an appeal or writ of error shall have been taken or sued out before the passage of this act shall be hereby affected, but in all such cases the jurisdiction of the supreme court shall remain, and said supreme court shall proceed therein as if this act had not been passed.

Approved January 20, 1897.

[45] In the act of March 1, 1895, creating a court of appeals for the Indian Territory, and giving it full jurisdiction, civil and criminal, the provision of section 11, that "writs of error and appeals from the final decision of said appellate court shall be allowed, and may be taken to the circuit court of appeals for the Eighth judicial circuit, in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States," conferred upon that court full appellate jurisdiction, including that in cases of infamous crimes, which was theretofore vested in the United States supreme court. Harless v. U. S. (8th Circuit) 31 C. C. A. 397, 88 Fed. 97.

The act of March 1, 1895 (2 Supp. Rev. St. p. 392), which extended the jurisdiction of the United States courts in the Indian Territory to capital cases, having also created the court of appeals in that territory, with power to entertain appeals and writs of error, the jurisdiction of such court to review judgments in capital cases is exclusive, and the supreme court has no appellate jurisdiction of such cases. Brown v. U. S., 19 Sup. Ct. 56; Curley v. Same, Id.

An act to amend the act creating the circuit court of appeals in regard to fees and costs, and for other purposes.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that the second section of an act to establish circuit courts of appeals, passed March third, eighteen hundred and ninety-one, be amended so that the clause therein which now reads, "The costs and fees in the supreme court now provided for by law shall be costs and fees in the circuit courts of appeals," shall read, "The costs and fees in each circuit court of appeals shall be fixed and established by said court in a table of fees, to be adopted within three months after the passage of this act: provided, that the costs and fees so fixed by any court of appeals shall not, with respect to any item, exceed the costs and fees now charged in the supreme court." Each circuit court of appeals shall, within three months after the fixing and establishing of costs and fees as aforesaid, transmit said table to the chief justice of the United States, and within one year thereof the supreme court of the United States shall revise said table, making the same, so far as may seem just and reasonable, uniform throughout the United States. The table of fees, when so revised, shall thereupon be in force for each circuit.[46]

Approved February 19, 1897.

[46] The table of fees prescribed by the supreme court pursuant to this act may be found on page clxxi., infra.

Sections 2 and 3 of the act approved June 1, 1898, concerning carriers engaged in interstate commerce and their employés, provide, in

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substance, that when a controversy in relation to wages, hours of labor, or conditions of employment shall arise between a carrier and its employés, seriously interrupting or threatening to interrupt the carrier's business, and the chairman of the interstate commerce commission and the commissioner of labor are unable to arrange a settlement, a board of arbitrators shall be selected, who shall, after hearing the parties, make an award which shall be binding for a period of one year, unless set aside as provided in section four of the act. That section provides:

"That the award being filed in the clerk's office of a circuit court of the United States, as hereinbefore provided, shall go into practical operation, and judgment shall be entered thereon accordingly at the expiration of ten days from such filing, unless within such ten days either party shall file exceptions thereto for matter of law apparent upon the record, in which case said award shall go into practical operation and judgment be entered accordingly when such exceptions shall have been finally disposed of either by said circuit court or on appeal therefrom.

"At the expiration of ten days from the decision of the circuit court upon exceptions taken to said award, as aforesaid, judgment shall be entered in accordance with said decision unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said exceptions and to be decided.

"The determination of said circuit court of appeals upon said questions shall be final, and being certified by the clerk thereof to said circuit court, judgment pursuant thereto shall thereupon be entered by said circuit court.

"If exceptions to an award are finally sustained, judgment shall be entered setting aside the award. But in such case the parties may agree upon a judgment to be entered disposing of the subject-matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award."

An act providing for the transfer from the circuit court of appeals for the Ninth circuit to the supreme court of certain appeals from the district court for Alaska.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that all cases, civil and criminal, filed on appeal from the district court of the United States for the district of Alaska in the United States circuit court of appeals for the Ninth judicial circuit, and pending on appeal therein on and prior to the thirtieth day of December, eighteen hundred and ninety-seven, of which the supreme court of the United States would have had jurisdiction under the then existing law, if a proper appeal had been taken thereto at the time said cases were filed on appeal in said circuit court of appeals, be, and the same are deemed and treated as regularly filed on appeal in the supreme court of the United

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States as of the date when filed in said circuit court of appeals. The clerk of said circuit court of appeals is directed to transmit to the supreme court of the United States, as soon as practicable, the records of such cases, and the clerk of said supreme court is directed to receive and file the same for hearing and determination in the supreme court of the United States when regularly reached on the docket, subject to any rules made or to be made by said court which may be applicable.

Approved, July 8, 1898.

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RULES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS.

AS ORIGINALLY ADOPTED AND SUBSEQUENTLY AMENDED

With Annotations from Decisions Rendered by the Supreme Court and Circuit Courts of Appeals.

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AMENDED RULES.

[Subsequent amendments to the rules of the United States Circuit Courts of Appeals will be published in future volumes of these reports.]

FIRST CIRCUIT.

[The rules as originally adopted, where identical with those of the other circuits, will be found at pages cxliii.–clxx. Only such originally adopted rules as were not identical with those of the other circuits, and amendments, changes, and repeals of the rules as originally adopted, are given under this head, reference being made to others in their proper places.]

1.

[As originally adopted. See page cxliii.]

2.

[As originally adopted. See page cxliii.]

3.

[This rule as originally adopted read as follows: "Terms. One term of this court shall be held annually at the city of Boston on the first Tuesday of October, and shall be adjourned to such times and places as the court may from time to time designate." It was amended, September 15, 1892, to take effect the first Tuesday in November following, Mr. Justice Gray, Judge Colt, and Judge Putnam being present, so as to read as follows:]

TERMS AND SESSIONS.

One term of this court shall be held annually at the city of Boston at ten o'clock in the forenoon on the first Tuesday of October. Stated sessions thereof shall be there held at the same hour on the first Tuesday of every month, and may be adjourned to such times and places as the court may from time to time designate. But, unless otherwise ordered, any adjournment shall be held to have been made to the first day of the next stated session.

4.

[Amendment, adopted October 4, 1898, to take effect on the 1st day of December following; Mr. Justice Gray, Judge Colt, and Judge Putnam being present.]

QUORUM.

1. In the absence of a quorum on any day appointed for holding a term, or on any day to which the court is adjourned, any judge who

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attends shall adjourn the court from day to day; or, if no judge is present, the clerk shall so adjourn; and, in the absence of all the judges and the clerk, the marshal or his deputy shall so adjourn. But the court may, from time to time, as provided in rule 3, enter orders directing an adjournment, or adjournments, for longer periods than from day to day, or sine die.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding or process, depending in or returned to the court, preparatory to hearing, trial or decision thereof.

5.

[As originally adopted. See page cxliv.]

6.

[Amendment, adopted September 15, 1892, to take effect the first Tuesday in November following; Mr. Justice Gray, Judge Colt, and Judge Putnam being present.]

MARSHAL AND OTHER OFFICERS.

The marshal shall be in attendance during the sessions of the court, with such number of bailiffs, messengers, and other officers as the court may from time to time order.

7.

[As originally adopted. See page cxliv.]

8.

[As originally adopted. See page cxlv.]

9.

[As originally adopted. See page cxlv.]

10.

[As originally adopted. See page cxlv.]

11.

[As originally adopted. See page cxlvi.]

12.

[As originally adopted. See page cliii.]

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13.

[Amendment, adopted October 4, 1898, to take effect the 1st day of December following; Mr. Justice Gray, Judge Colt, and Judge Putnam being present.]

SUPERSEDEAS AND COST BONDS.

1. Supersedeas bonds in the circuit and district courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but, in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

2. On an appeal from an interlocutory order or decree granting, continuing, refusing or dissolving an injunction, the appellant shall, at the time of the allowance thereof, file a bond to the adverse party in such sum as the judge who allowed the appeal shall direct, to answer all costs if he shall fail to sustain his appeal.

14.

[Amendment, adopted February 23, 1894; Judge Colt, Judge Putnam, and Judge Nelson being present.]

WRITS OF ERROR, APPEALS, RETURN, AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.*

2. In all cases brought to this court by writ of error or appeal to review any judgment or decree, the clerk of the court by which

* On an appeal in equity, in the absence of joint stipulation for simplifying the transcript, the clerk should send up the whole of the record, in the strict sense of the word, made as directed by Rev. St. § 750, except that, when there has been a previous appeal, matters preceding the mandate should ordinarily be omitted; and, if any parts thereof are omitted, even by joint stipulation, their nature should be indicated. But as to the proofs, entries, and papers on file "necessary to the hearing of the appeal" (Rev. St. § 698), the clerk, in the absence of joint stipulation, is to be guided ordinarily by the selections of the appellant's solicitor. Nashua & L. R. Corp. v. Boston & L. R. Corp. (1st Circuit) 9 C. C. A. 468, 61 Fed. 237.

See, also, note 12, page clv.

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ıch judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.†

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.††

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the supreme court.** The testimony in such record shall embrace the viva voce proof in the district court, if the same, or the substance thereof, has been reduced to writing with the approval of its judge. The reasonable cost of so reducing the same to writing may be taxed as a part of the cost of the record, except so far as allowed as costs in the district court.

7. Further proof in instance causes in admiralty shall include only that which could not with diligence have been had at the trial below, or which was there rejected, or was omitted through misapprehension, provided the evidence be accompanied with a certificate of counsel showing reasonable excuse for the misapprehension. Except by order of the court first obtained, merely cumulative proofs shall not be so taken; but for this purpose the evidence of witnesses who had different duties, interests, or opportunities of observation

†A clerk's certificate, which shows that certain parts of the record were omitted from the transcript by direction of appellant's attorney, is, nevertheless, sufficient to bar a motion to dismiss the appeal, when it does not appear that the omitted parts are "necessary to the hearing"; and in such case the appellee, if he thinks the transcript defective, must resort to a certiorari or other remedy. Nashua & L. R. Corp. v. Boston & L. R. Corp. (1st Circuit) 3 C. C. A. 468, 61 Fed. 237.

†† See note 14, page clviii.

** The amendment to paragraph 6 of this rule as originally adopted and paragraphs 7–10 were promulgated February 23, 1894. In a case in which the questions covered by the rules were brought up, the court say that these rules must not be construed as permitting taking anew oral proofs taken in the district court, and not preserved in the record. The Philadelphian (1st Circuit) 9 C. C. A. 54, 60 Fed. 423.

A rule in relation to "testimony in admiralty cases after appeal" was promulgated in the Sixth circuit as rule 35. "Rules in Admiralty" were previously promulgated in the Second circuit, which will be found at pages lxvii.–lxxii., post.

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will not ordinarily be held cumulative in cases of collision or other maritime tort.

8. Such further proof may be taken after the appeal is allowed, in the manner provided by law for depositions de bene esse, or by an examiner appointed by any circuit or district judge, or selected by the parties, or upon interrogatories and commissions as provided in rule 44 of the circuit courts of this circuit, mutatis mutandis. It must be taken and filed forthwith after it is obtainable, but it cannot, except by order of the court, be taken or filed within thirty days before any session at which the cause may be heard as provided in paragraph 2 of rule 17, nor thereafterwards until the cause has been postponed to the next term or session.

9. Objections to further proof shall be filed with the magistrate and returned with the evidence. Within seven days after the evidence is taken, the party so objecting may file in print a motion to suppress the same, with a copy of the objections and a brief. The other party may within seven days thereafter file in print a counter statement and brief. The objections and counter statement, so far as they contain matters of fact dehors the record, shall be verified by affidavit. The court will consider the objections in advance of the trial, or in connection therewith, as it may in each case determine, and without oral argument, and will order suppressed evidence not rightfully taken. The party taking the evidence so suppressed shall pay the costs arising therefrom, including the printing thereof.

10. Nothing herein shall exclude applications for leave to take further proof, or objections thereto, in advance of the taking thereof, or objections touching the formalities of taking it; but the latter must be brought to the attention of the court forthwith after the evidence is filed.

15.

[As originally adopted. See page clviii.]

16.

[Amendment, adopted October 4, 1898, to take effect on the 1st day of December following; Mr. Justice Gray, Judge Colt, and Judge Putnam being present.]

DOCKETING CASES.

1. The plaintiff in error or appellant shall docket the case, and file the record thereof, on or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any circuit or district judge, may enlarge the time, the order of enlargement to be filed in this court.

2. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the case docketed and dismissed, whether in term time or vacation, upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case, the return day of the citation, and that the writ of error or appeal was duly sued out or allowed. And the

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plaintiff in error or appellant shall not be entitled to docket the case, or file the record, after the same shall have been docketed and dismissed under this rule, unless by the order of the court after notice to the adverse party.

But the defendant in error or appellee may, at his option, docket the case and file the record; and, if the case is docketed and the record filed by the plaintiff in error or appellant within the time prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.

3. On the filing of the record, the appearance of the counsel for the party docketing the case shall be entered.

17.

[Amendment, adopted October 4, 1898, to take effect on the 1st day of December following; Mr. Justice Gray, Judge Colt, and Judge Putnam being present.]

DOCKET AND CALENDARS.

1. The clerk shall enter and number on the docket all cases consecutively, in their proper chronological order.

2. He shall print at least twenty days before the first Tuesdays of October, January and April, respectively, a calendar of all the pending cases, arranged by districts in the following order: Maine, New Hampshire, Rhode Island, Massachusetts.

18.

[As originally adopted. See page clx.]

19.

[As originally adopted. See page clxi.]

20.

[As originally adopted. See page clxii.]

21.

[Amendment, adopted September 15, 1892, to take effect the first Tuesday in November following; Mr. Justice Gray, Judge Colt, and Judge Putnam being present.]

MOTIONS.

1. The motion day shall be the first Tuesday of every stated session of the court, and any other Tuesday while the court shall remain in session.

2. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

3. All motions to dismiss writs of error or appeals (except motions to docket and dismiss under rule 16), or to advance cases, or for a

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writ of certiorari, and other special motions, shall be printed, and be accompanied by printed briefs.

4. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party or his counsel.

5. Any motion of which counsel shall have given notice to the clerk in advance shall be entered on the clerk's list in the order in which he receives notice thereof, and shall have priority in that order before other motions, unless otherwise specially ordered by the court.

6. Half an hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

22.

[Amendment, adopted October 4, 1898, to take effect on the 1st day of December following; Mr. Justice Gray, Judge Colt, and Judge Putnam being present.]

CALL AND ORDER OF THE CALENDAR.

1. On the first Tuesdays of October, January and April, the court, except as may, from time to time, be otherwise ordered, will commence calling cases for argument in the order in which they stand on the calendar, and proceed from day to day during the session in the same order; but no case from the district of Massachusetts shall be called before the second Tuesday of the session.

2. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called, and the writ of error or appeal dismissed.

3. Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff and to give judgment according to the right of the case.

4. When a case is reached in the regular call of the calendar, and there is no appearance for either party, the case may be dismissed at the cost of the plaintiff.

5. If either of the parties is ready when the case is called, the same may be heard; and, if neither party is ready, the case may be dismissed, or be postponed to the next session, as the court may order.

6. If a case is called for hearing at two stated sessions successively, and, on the call at the second session, neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

23.

[Amendment, adopted September 15, 1892, to take effect the first Tuesday in November following; Mr. Justice Gray, Judge Colt, and Judge Putnam being present. Paragraph 8, under the amendment of September, 1892, provided for an additional fee of 15 cents per page to be paid the clerk for preparing the record and for all other incidental services relating to the subject-matter of this rule. This paragraph was repealed by the amendment of October 4,

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1898, to take effect on the 1st day of December following; Mr. Justice Gray, Judge Colt, and Judge Putnam being present.]

PRINTING RECORDS.†

1. In all cases, the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.

2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when the case is reached at the regular call of the docket,** the case may be dismissed.

3. Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed under the clerk's supervision, for the use of the court and of counsel.

4. The clerk shall take to the printer the original transcript on file, but shall cause copies to be made for the printer of such original papers sent up under rule 14, or other original papers, as are necessary to be printed.

5. The clerk shall supervise the printing, and see that the printed copies are properly indexed; and he shall distribute printed copies to the judges and the reporter, from time to time, as required, and three copies to the counsel for each party. An additional number of copies may be printed at the request of either party for his own use and at his own expense, or by order of the court.

6. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record.

7. The clerk may receive from either party, and use as parts of the printed record, so far as the same may be of proper and convenient size and type, any portions which have been printed in any other court, and also printed copies of patents and other exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing.

8. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

9. In case of reversal, affirmance, or dismissal, with costs, the

† See order of the supreme court establishing a table of fees for the circuit courts of appeals, page clxxi., post.

** See note 20, page clxiv.

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cost of printing the record and the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

24.

[As originally adopted. See page clxiv.]

25.

[As originally adopted. See page clxvi.]

26.

[As originally adopted. See page clxvi.]

27.

[As originally adopted. See page clxvii.]

28.

[As originally adopted. See page clxvii.]

29.

[Amendment, adopted October 4, 1898, to take effect on the 1st day of December following; Mr. Justice Gray, Judge Colt, and Judge Putnam being present.]

REHEARING.

A petition for a rehearing after judgment may be filed at the term at which the judgment is entered, and within one calendar month after such entry, and not later, unless by leave granted during the term. It must be in print, in the form and style required by rule 26, and it must briefly and distinctly state its grounds, and be supported by a certificate of counsel. It will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the court so determines. Provided, whenever a judgment is entered within less than a month before the term adjourns, the petition may be filed within a month after the entry of judgment, and with the same effect after the term as though filed before the adjournment.

30.

[This rule as originally adopted is the same as rule 30, on page clxviii., except that the words "or territory" are omitted after the word "state."]

31.

[As originally adopted. See page clxviii. See, also, order of the supreme court establishing a table of fees for the circuit courts of appeals, page clxxi., post.]

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32.

[Amendment, adopted October 4, 1898, to take effect on the 1st day of December following; Mr. Justice Gray, Judge Colt, and Judge Putnam being present.]

MANDATE.

In every case finally determined, a mandate, or other proper process in the nature of a procedendo, shall be issued to the court below, for the purpose of informing that court of the proceedings in this court, so that further proceedings may be had in the court below as to law and justice may appertain. Such mandate, or other process, may issue at any time on the order of the court; but, unless otherwise ordered, it shall issue as of course after two calendar months from the entry of judgment, unless a petition for a rehearing has been filed and remains undisposed of.

33.

[As originally adopted. See page clxx.]

34.

[As originally adopted. See page clxx.]

ERROR IN CRIMINAL CASES.

On or after the allowance of a writ of error in a criminal case cognizable by this court, the justice or judge who allowed the writ, or the court which entered the judgment, or any judge thereof, shall have power to admit to bail the plaintiff in error, according to the rules of law applicable to his case.

And it is further ordered, the clerk shall cause to be printed two hundred copies of the foregoing order amending the rules, and he shall distribute the same to the member of the bar; and further, under the direction of the circuit judges, he shall arrange with some suitable publisher for the publication of the rules as amended, in such form and on such terms as the circuit judges may direct.

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SECOND CIRCUIT.

[The rules as originally adopted, where identical with those of the other circuits, will be found at pages cxliii.–clxx. Only such originally adopted rules as were not identical with those of the other circuits, and amendments, changes and repeals of the rules originally adopted, are given under this head, reference being made to others in their proper places.]

1.

[As originally adopted. See page cxliii.]

2.

[As originally adopted. See page cxliii.]

3.

[This rule as originally adopted reads as follows:]

TERMS.

One term of this court shall be held annually at the city of New York on the last Tuesday of October, and shall be adjourned to such times and places as the court may from time to time designate.

4.

[As originally adopted. See page cxliii.]

5.

[As originally adopted. See page cxliv.]

6.

[As originally adopted. See page cxliv.]

7.

[As originally adopted. See page cxliv.]

8.

[As originally adopted. See page cxlv.]

9.

[As originally adopted. See page cxlv.]

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10.

[As originally adopted. See page cxlv.]

11.

[As originally adopted. See page cxlvi.]

12.

[As originally adopted. See page clii.]

13.

[As originally adopted. See page cliii.]

14.

[As originally adopted. See page clv.]

15.

[As originally adopted. See page clviii.]

16.

[As originally adopted. See page clix.]

17.

[As originally adopted. See page clx.]

18.

[As originally adopted. See page clx.]

19.

[As originally adopted. See page clxi.]

20.

[As originally adopted. See page clxii.]

21.

[As originally adopted. See page clxiii.]

22.

[As originally adopted. See page clxiii.]

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23.

[Amendment adopted October 19, 1891; Mr. Justice Blatchford, Judge Wallace, and Judge Lacombe being present.]

PRINTING RECORDS.**

On the filing of the transcript, in every case, the clerk shall forthwith cause 15 copies of the same to be printed, and shall furnish 3 copies thereof to each party, at least 30 days before the argument, and shall file 9 copies thereof in his office. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record. The clerk shall be entitled to demand of the appellant, or plaintiff in error, the cost of printing the record, before ordering the same to be done. If the record shall not have been printed when the case is reached for argument, for failure of a party to advance the costs of printing, the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

24.

[Amendment adopted October 19, 1891; Mr. Justice Blatchford, Judge Wallace, and Judge Lacombe being present.]

BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court, at least 20 days before the case is called for argument, 10 copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in order here stated:*

(1) A concise abstract or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2) A specification of the errors relied upon,† which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and, in cases brought up by appeal, the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or

** See order of the supreme court establishing a table of fees for the circuit courts of appeals, page clxxi., post.

* See note 21, page clxiv.

† See note 22, page clxiv.

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rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused.†† When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report, and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk, at least 10 days before the case is called for hearing, 10 copies of his printed brief, one of which shall, on application, be furnished to each of the counsel on the opposite side. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and, when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but, if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

25.

[Paragraph 3 was amended March 9, 1896, so as to read as follows: "One hour on each side will be allowed for the argument in customs appeals, and writs of error, and two hours in other appeals, and no more, without special leave of the court, granted before argument begins." It was further amended November 5, 1898, to read as follows:]

ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

†† See note 28, page clxv.

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3. Upon writs of error, appeals in customs cases and appeals from orders granting or refusing a preliminary injunction, one hour on each side, and in other cases two hours will be allowed for the argument, and no more, without special leave of the court granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion, provided always that a fair opening of the case shall be made by the party having the opening and closing arguments.

26.

[As originally adopted. See page clxvi.]

27.

[As originally adopted. See page clxvii.]

28.

[As originally adopted. See page clxvii.]

29.

[As originally adopted. See page clxvii.]

30.

[As originally adopted. See page clxviii. See, also, order of the supreme court establishing a table of fees for the circuit courts of appeals, page clxxi., post.]

31.

[As originally adopted. See page clxviii.]

32.

[As originally adopted. See page clxx.]

33.

[As originally adopted. See page clxx.]

34.

[As originally adopted. See page clxx.]

[The following announcements and orders have been made:]

The court announces that hereafter the sessions of the court will commence at 10:30 a. m., and continue until 1:30 p. m.

Dated October 25, 1892.

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Motions will be heard during the sessions of this court on Mondays, at 10:30 a. m. All notes of issue for the motion calendar must be filed with the clerk not later than the Friday next preceding the motion day.

Dated March 24, 1893.

35.

[Adopted May 3, 1897; Judge Wallace, Judge Lacombe, and Judge Shipman being present.]

1. An appeal or writ of error from a circuit court or a district court to this court in the cases provided for in sections 6 and 7 of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, and acts to amend said act approved February 18, 1895, and January 20, 1897, may be allowed in term time or vacation by the circuit justice or by any circuit judge within the circuit, or by any district judge within his district, and the proper security be taken and the citation be signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.

2. Where such writ of error to this court is allowed in the case of a conviction of an infamous crime or in any other criminal case in which it will lie, the circuit court or district court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

36.

[Adopted May 18, 1898.]

Rule 36. In all cases the plaintiff in error or appellant on docketing a case and filing the record, shall enter into an undertaking with the clerk, for the payment of his fees or otherwise satisfy him in that behalf.

At the expiration of ten days after a case has been decided, the order or decree thereon will be entered by the court, and the clerk will thereupon prepare and tax the bill of costs and issue the mandate. Within said ten days the parties may file with the clerk their proposed orders or decrees and bills of costs with proof of service of the same upon the opposing attorneys.

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RULES IN ADMIRALTY.

[The following rules in admiralty were adopted May 20, 1892, to take effect on July 1, 1892, and were readopted, with amendments, October 5, 1892; Mr. Justice Blatchford, Judge Wallace, and Judge Lacombe being present. The amendments of October 5, 1892, are noted in their proper places.]

I.

APPEALS AND NEW PLEADINGS.

An appeal to the circuit court of appeals shall be taken by filing in the office of the clerk of the district court, and serving on the proctor of the adverse party, a notice, signed by the appellant or his proctor, that the party appeals to the circuit court of appeals from the decree complained of.

[If the appellant desires to make new pleadings or take new evidence on the appeal, his notice of appeal must so state. If the notice does not so state,]* the appeal shall be heard on the pleadings and evidence in the district court, unless the appellate court, on motion, otherwise order.

II.

NOTICE AND BOND.

Section 1. When a notice of appeal is served, the appellant shall file in the clerk's office of the district court a bond for costs of the appeal, with sufficient surety in the sum of $250, conditioned that the appellant shall prosecute his appeal to effect, and pay the costs if the appeal is not sustained. Such security shall be given within ten days after filing the notice, or the appeal shall be deemed abandoned, and the decree of the court below enforced, unless otherwise ordered by a judge of this court.

Sec. 2. And if the appellant desires to stay the execution of the decree of the court below, the bond which he shall give shall be a bond with sufficient surety in such further sum as the judge of the district court or a judge of this court shall order, conditioned that he will abide by and perform whatever decree may be rendered by this court in the cause, or on the mandate of this court by the court below.

Sec. 3. The appellant shall, on filing either of such bonds, give notice of such filing, and of the names and residence of the sureties; and if the appellee, within two days, excepts to the sureties, they shall justify, on notice, within two days after such exception.

III.

REVIEW IN PART ONLY.

The appellant may also, at his option, state in his notice of appeal that he desires only to review one or more questions involved in the cause, which questions must be clearly and succinctly stated; and

* The words in brackets were stricken out by amendment, Oct. 5, 1892.

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he shall be concluded in this behalf by such notice, and the review upon such an appeal shall be limited to such question or questions.

IV.

APOSTLES ON APPEAL TO CONTAIN.

Section 1. The apostles, on an appeal to this court, shall, in cases where a general notice of appeal is served, consist of the following:

(1) A caption exhibiting the proper style of the court and the title of the cause, and a statement showing the time of the commencement of the suit; the names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place; the several dates when the respective pleadings were filed; whether or not the defendant was arrested, or bail taken, or property attached or arrested, and, if so, an account of the proceedings thereunder; the time when the trial was had, and the name of the judge hearing the same; whether or not any question was referred to a commissioner or commissioners, and, if so, the result of the proceedings and report thereon; the date of the entry of the interlocutory and final decrees; and the date when the notice of appeal was filed.

(2) All the pleadings, with the exhibits annexed thereto.

(3) All the testimony and other proofs adduced in the cause.**

(4) The interlocutory decree, and any order of the court which appellant may desire to have reviewed on the appeal.

(5) Any report of a commissioner or commissioners, to which exception may have been taken, with the order or orders of the court respecting the same, and the exceptions to the report, and so much of the testimony taken in the proceeding as may be necessary to a review of the exceptions.

(6) All opinions of the court, whether upon interlocutory questions or finally deciding the cause.*

(7) The final decree, and the notice of appeal. [And

(8) The assignments of error.]†

Sec. 2. All other papers shall be omitted unless otherwise ordered by the judge who heard the cause.

Sec. 3. Where the appellant shall appeal specially, and seek only to review one or more questions involved in the cause, the apostles may, by stipulation between the proctors for the respective parties, contain only such papers and proceedings and evidence as are necessary to review the questions raised by the appeal.

** It is always desirable, upon appeals in admiralty, to have the record so prepared that it will show which witnesses were examined in the presence of the district judge, and which were not. The Gypsum Prince (2d Circuit) 14 C. C. A. 573, 67 Fed. 612.

* See the order of May 9, 1893, post, page lxxii.

† The words in brackets were added by amendment, Oct. 5, 1892.

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V.

CERTIFYING RECORDS.

The appellants shall, within thirty days after giving notice of appeal, procure to be filed in this court the apostles certified by the clerk of the district court, or, in case of a special appeal, the stipulated record, with the certification by the said clerk of all papers contained therein on file in his office.

VI.

IF APPEARANCE OF APPELLEE NOT ENTERED.

If the appellee does not cause his appearance to be entered in this court within ten days after service on his proctor of notice that the apostles are filed in this court, the appellant may proceed ex parte in the cause, and have such decree as the nature of the case may demand.

VII.

NEW ALLEGATIONS, ETC.

Upon sufficient cause shown, this court, or any judge thereof, may allow either appellant or appellee to make new allegations, or pray different relief, or interpose a new defense, or take new proofs. Application for such leave must be made within fifteen days after the filing of the apostles, and upon at least four days' notice to the adverse party.††

VIII.

NEW PLEADINGS—NEW TESTIMONY.

If leave be granted to make new allegations, pray different relief, or interpose a new defense, the moving party shall, within ten days thereafter, serve such new pleading, duly verified, on the adverse party, who shall, if such pleading be a libel, within twenty days answer on oath.

If leave be given to take new testimony, the same may be taken and filed within thirty days after the entry of the order granting such leave, and the adverse party may take and file counter testimony within twenty days after such filing.

†† This rule is not an innovation in admiralty practice, but it will not be enforced as against a party whose case was tried in the district court prior thereto, in reliance upon the right to introduce such new testimony on an appeal as was permissible under the then existing rules and practice of the circuit. In such case the court will, as under the old practice, receive new material evidence which was not intentionally withheld in the district court. The Venezuela (2d Circuit) 3 C. C. A. 319, 52 Fed. 873.

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IX.

NEW TESTIMONY—HOW TAKEN.

Such testimony shall be taken by deposition before any United States commissioner or notary public, upon reasonable notice in writing given to the opposite party; or by commission issued out of this court, with interrogatories annexed. Upon proper cause shown, the court may grant an open commission.

X.

PRINTING NEW PLEADINGS AND TESTIMONY.

If new pleadings are filed or testimony taken in this court, the same shall also be printed and furnished by the clerk, as in the 23d general rule provided.

XI.

MOTIONS.

All motions shall be made upon at least four days' notice.

XII.

WRIT OF INHIBITION.

A writ of inhibition may be awarded by this court on motion of the appellant, to stay proceedings in the court below, when circumstances require.

XIII.

MANDAMUS.

A mandamus may, in like manner, be obtained, to compel a return of the apostles when unreasonably delayed by the clerk or court below.

XIV.

CASES TO BE PLACED ON DOCKET.

Each case shall be placed on the docket as soon as the printing [of the apostles] * is completed by the clerk.

XV.

BRIEFS.

Section 1. Counsel for the appellant shall file with the clerk of this court, at least twenty days before the case is called for argument, ten copies of a printed brief, and shall, at the same time,

* The words in brackets were added by amendment, October 5, 1892.

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serve two copies thereof on the proctors of record, or on the counsel engaged upon the opposite side. This brief shall contain, in order here stated:

(1) A statement of the nature of the appeal, the court from which the appeal is taken, and a concise abstract or statement of the case, presenting succinctly the questions involved, and the manner in which they were raised.

(2) If the pleadings have been amended in this court, or new proofs have been taken, it shall be stated what amendments have been made, and in what respect the new proofs have changed, or tended to change, the case as made in the court below.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the folios of the record or to the numbers of the questions, and the authorities relied upon in support of each point.

Sec. 2. The counsel for the appellee shall file with the clerk of the court ten printed copies of his brief, and serve two copies thereof at least ten days before the case is called for argument. His brief shall be of a like character with that required of the appellant, and, in case new proofs are taken on behalf of the appellee, the brief shall so state, and wherein the new proofs have changed the case as made in the court below.

Sec. 3. The reasonable expense of printing briefs shall be an item of taxable costs.

XVI.

MANDATES.

The decrees of this court shall direct that a mandate issue to the court below.†

XVII.

EXTENSION OF TIME.

The time specified in the foregoing rules for any proceeding may be extended by order of a judge of this court.

XVIII.

WHEN RULES OF DISTRICT COURTS TO APPLY.

In all matters in civil causes of admiralty and maritime jurisdiction, not expressly provided for by the foregoing rules of this court, the rules of practice of the district court of the district in which the cause was decided, being in force at the time, (not being inconsistent with these rules,) will be adopted so far as may seem proper.

† A second paragraph of this rule reading as follows: "The decrees of this court shall direct that a mandate issue to the court below,"—was stricken out by an amendment adopted May 8, 1898.

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XIX.

WHAT GENERAL RULES SHALL BE DEEMED ADMIRALTY RULES.*

The following of the general rules of this court, and no others, shall be deemed admiralty rules, viz.: Rules 3, 4, 5, 6, 7, 9, 11, 12; section 4 of rule 14; rules 15, 16, 17, 18, 19, 20, 21, 22; amended rule 23; section 5 of rule 24; rules 25, 26, 27, 28, 29; section 4 of rule 30; rules 31, 32, 34, and 36.

[The following announcement was made May 9, 1893:]

Hereafter the provision contained in subdivision 6 of section 1 of rule IV. in admiralty, that "all opinions of the court, whether upon interlocutory questions or finally deciding the cause," shall be certified up with the apostles, must be strictly complied with, and such opinions must be printed.

Dated May 9, 1893.

* This rule was added by amendment, October 5, 1892.

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THIRD CIRCUIT.

[The rules as originally adopted, where identical with those of the other circuits, will be found at pages cxliii.–clxx. Only such originally adopted rules as were not identical with those of the other circuits, and amendments, changes, and repeals of the rules as originally adopted, are given under this head, reference being made to others in their proper places.]

1.

[As originally adopted. See page cxliii.]

2.

[As originally adopted. See page cxliii.]

3.

[This rule as originally adopted read as follows: "Terms. The terms of this court shall commence and be held on the third Tuesday of March and the third Tuesday of September in each year, except the present term, at the city of Philadelphia." It was amended October 13, 1893, Judge Acheson, Judge Dallas, Judge Butler, and Judge Green being present, so as to read as follows:]

TERMS.

The terms of this court shall commence and be held on the first Tuesday in March and the third Tuesday in September, at the city of Philadelphia.

4.

[As originally adopted. See page cxliii.]

5.

[As originally adopted. See page cxliv.]

6.

[As originally adopted. See page cxliv.]

7.

[This rule as originally adopted reads as follows:]

ATTORNEYS AND COUNSELORS.

All attorneys and counselors admitted to practice in the supreme court of the United States, or in any circuit court of the United States, shall become attorneys and counselors in this court on tak-

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ing an oath or affirmation in the form prescribed by rule 2 of the supreme court of the United States, and on subscribing the roll; but no fee shall be charged therefor; and all attorneys and counselors of the circuit court of the United States for the Third circuit shall be attorneys and counselors of this court without taking any further oath.

8.

[As originally adopted. See page cxlv.]

9.

[As originally adopted. See page cxlv.]

10.

[As originally adopted. See page cxlv.]

11.

[As originally adopted. See page cxlvi.]

12.

[As originally adopted. See page cliii.]

13.

[As originally adopted. See page cliii.]

14.

[The rule as originally adopted reads as follows:]

WRITS OF ERROR, APPEALS, RETURN, AND RECORD.

1. The clerk of the court to which any writ of error may be directed, upon being paid or tendered his fees therefor, shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.*

2. In all cases brought to this court by writ of error or appeal to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.†

* See note 12, page clv. † See note 13, page clvii.

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4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.††

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the supreme court.

15.

[As originally adopted. See page clviii.]

16.

[As originally adopted. See page clix.]

17.

[As originally adopted. See page clx.]**

18.

[As originally adopted. See page clx.]

19.

[As originally adopted. See page clxi.]

20.

[As originally adopted. See page clxii.]

21.

[As originally adopted. See page clxiii.]

22.

[As originally adopted. See page clxiii.]

†† See note 14, page clviii.

** But see order made December 7, 1802, post, page lxxvii.

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23.

[This rule as originally adopted was the same as rule 23, on page clxiii., except that it read "ten copies of the record," in place of "twenty copies of the record." It was amended September 22, 1892, by substituting "twenty" for "ten." It was again amended December 7, 1893, so as to read as follows:]

PRINTING RECORDS.

1. On the filing of the transcript, the clerk shall forthwith cause twenty copies of the record to be printed, and shall furnish three copies thereof to each party at least six days before the case is called for argument, and shall file fourteen copies thereof in his office. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record. The clerk may demand of the plaintiff in error or appellant the cost of printing the record before ordering the same to be done. If the record shall not have been printed when the case is reached in the regular call of the docket* because of the failure of a party to advance the cost of printing, the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

2. The clerk shall receive from either party, and use as parts of the printed record, so far as the same may be of proper and convenient size and type, any portions which have been printed in any other court, and also printed copies of patents and other exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing.

[March 18, 1895, the following order was made:]

Ordered that, except upon special allowance by the court or a judge, no cause shall be placed on the docket for argument unless the transcript shall have been filed by the clerk, under rule 23, at least 10 days before the first day of the term.

24.

[This rule as originally adopted was the same as rule 24, on page clxiv., except that it read "ten" for "twenty," in sections 1 and 3. It was amended September 22, 1892, by changing "ten" to "twenty," so as to conform to such rule.]

25.

[As originally adopted. See page clxvi.]

26.

[As originally adopted. See page clxvi.]

* See note 20, page clxiv.

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27.

[As originally adopted. See page clxvii.]

28.

[This rule as originally adopted reads as follows:]

OPINIONS OF THE COURT.

1. All written opinions delivered by the court shall be delivered to the clerk and recorded.

2. Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but, at the end of each term, the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes; and, when so bound, they shall be deemed to have been recorded, within the meaning of this rule.

29.

[As originally adopted. See page clxvii.]

30.

[This rule as originally adopted is the same as rule 30, page clxviii., except that the words "or territory" are omitted after the word "state."]

31.

[As originally adopted. See page clxviii. With the order of the supreme court establishing a table of fees for the circuit courts of appeals adopted as paragraph 7. See page clxxi., post.]

32.

[As originally adopted. See page clxx.]

33.

[As originally adopted. See page clxx.]

34.

[As originally adopted. See page clxx.]

[The following order was made December 7, 1892:]

It is ordered that hereafter there shall be but a single court docket, and no "special docket," and cases shall be placed thereon as follows:

I. Those cases on the trial or hearing of which both of the circuit judges shall be competent to sit.

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II. Those cases on the trial or hearing of which the circuit judge oldest in commission, shall be competent to sit.

III. Those cases on the trial or hearing of which the circuit judge youngest in commission, but not the other circuit judge, shall be competent to sit.

Under and with respect to each of these three general divisions, there shall be placed first in order upon the docket those cases in which the district judge assigned for the term shall be competent to sit, and immediately thereafter the cases in which he shall not be competent to sit.

Subject to the foregoing, cases shall be arranged in proper chronological order as heretofore.

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FOURTH CIRCUIT.

[The rules as originally adopted, where identical with those of the other circuits, will be found at pages cxliii.–clxx. Only such originally adopted rules as were not identical with those of the other circuits, and amendments, changes, and repeals of the rules originally adopted, are given under this head, reference being made to the others in their proper places.]

1.

[As originally adopted. See page cxliii.]

2.

[As originally adopted. See page cxliii.]

3.

[This rule as originally adopted read as follows: "Terms. There shall be held in the city of Richmond three regular terms of this court—one on the first Tuesday of February, one on the fourth Tuesday of May, and one on the second Tuesday of October—in each year." It was amended October 13, 1892, by substituting "first" Tuesday in October for "second" Tuesday. It was further amended June 11, 1895, so as to read as follows:]

TERMS.

There shall be held in the city of Richmond, Virginia, three regular terms of this court; one on the first Tuesday of February, one on the first Tuesday of May, and one on the first Tuesday of November, in each year.

4.

[As originally adopted. See page cxliii.]*

5.

[As originally adopted. See page cxliv.]

6.

[As originally adopted. See page cxliv.]

7.

[Amended May 29, 1896, so as to read as follows:]

ATTORNEYS AND COUNSELLORS.

All attorneys and counsellors admitted to practice in the supreme court of the United States, or in any circuit court of the United

* See order of October 19, 1892, post, page lxxxiv.

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States, shall become attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by rule 2 of the supreme court of the United States, subscribing the roll, and on payment of a fee of five dollars.

8.

[As originally adopted. See page cxlv.]

9.

[As originally adopted. See page cxlv.]

10.

[As originally adopted. See page cxlv.]

11.

[As originally adopted. See page cxlvi.]

12.

[As originally adopted. See page cliii.]

13.

[As originally adopted. See page cliii.]

14.

[As originally adopted. See page clv.]

15.

[As originally adopted. See page clviii.]

16.

[As originally adopted. See page clix.]

17.

[As originally adopted. See page clx.]

18.

[As originally adopted. See page clx.]

19.

[As originally adopted. See page clxi.]

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20.

[As originally adopted. See page clxii.]

21.

[As originally adopted. See page clxiii.]

22.

[As originally adopted. See page clxiii.]

23.

[Amendment adopted May 19, 1898.]

1. Hereafter all records shall be printed under the supervision of the clerk, by such printer and at such rate as the court may designate.

2. Upon the payment of the estimated cost of printing, together with the supervising fees as established by law (which amounts shall be deposited with the clerk within ten days after notice thereof), the clerk shall cause to be printed thirty copies of the record, twenty copies of which shall be filed for the use of the court, three copies furnished to the adverse party, and the remaining copies delivered to the appellant or plaintiff in error at least ten days before the term or adjourned term.

3. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record.

4. If the record shall not have been printed when the case is reached in the regular call of the docket,* the case may be dismissed.

5. In case of reversal, affirmance, or dismissal, with costs, the amount paid for the printing of the record and the clerk's fees for supervising the same, shall be taxed against the party against whom costs are given.

24.

[Amendment adopted February 4, 1892.]

BRIEFS.

1. The counsel for plaintiff in error or appellant shall file with the clerk of this court, at least ten days before every term or adjourned term, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in order here stated:**

* See note 20, page clxiv.

** See note 21, page clxiv.

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(1) A concise abstract or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2) A specification of the errors relied upon,† which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and, in cases brought up by appeal, the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused.†† When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report, and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record, and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief, at least three days before the term or adjourned term. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error, not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and, when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but, if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

† See note 22, page clxiv.

†† The court will not consider a bill of exceptions to instructions given or refused, unless it contains the evidence on which the question of law raised by the instructions arose. It is not enough that the testimony be found in another part of the record. Improvement Co. v. Frari (4th Circuit) 7 C. C. A. 149, 58 Fed. 171.

See, also, note 23, page clxv.

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25.

[As originally adopted. See page clxvi.]

26.

[Amendment adopted February 4, 1892.]

FORM OF PRINTED RECORDS, ARGUMENTS, AND BRIEFS.

All records, arguments, and briefs printed for the use of this court shall be in small pica type, 24 pica ems to a line, with an index, and a suitable cover, containing the title of the court and cause, the court from which the case is brought into this court, and the number of the case. Size of pages to be 9¼x6¼ inches, except that in patent cases the size of the pages shall be 10¾x7⅝ inches; that is to say, large enough to bind in copies of patent-office drawings and specifications without folding. So much of the record as was printed in the court below may be used in this court if it conforms to this rule.

27.

[Amended May 29, 1896, so as to read as follows:]

COPIES OF RECORDS AND BRIEFS.

The clerk shall cause to be bound and shall carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs and arguments filed therein.

28.

[Amended May 29, 1896, so as to read as follows:]

OPINIONS OF THE COURT.

1. All opinions delivered by the court shall be printed under the supervision of the judge delivering the same, or of one of the circuit judges, the cost of such printing to be paid by the clerk out of the revenues of his office and charged to the litigants in the respective cases to be taxed and allowed as other costs.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. The clerk of this court shall from time to time cause two sets of the printed opinions of this court to be bound in a substantial manner into volumes, one set to be kept in the clerk's office and one set to be kept in the court library.

29.

[As originally adopted. See page clxvii.]

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30.

[As originally adopted. See page clxviii.]

31.

[As originally adopted. See page clxviii. See, also, order of the supreme court establishing a table of fees for the circuit courts of appeals, page clxxi., post.]

32.

[As originally adopted. See page clxx.]

33.

[As originally adopted. See page clxx.]

34.

[As originally adopted. See page clxx.]

35.

[The following new rule was adopted May 29, 1893:]

The clerk in making his docket shall not set down for argument any cause for any Saturday of the term for which such docket is intended, and that this court will meet on said days for consultation only.

[The following order was made October 19, 1892:]

ATTENDANCE OF DISTRICT JUDGES—NOTICE.

It is ordered that the clerk of this court shall, thirty days before the commencement of each term thereof, notify one of the district judges of this circuit, commencing with the oldest in commission, that his presence is desired during said term, as a member of the court: provided, that if the chief justice, or either of the circuit judges, prior to the commencement of any term, advise the clerk of their inability, or the inability of either of them, to attend and remain during the then coming term of court, then the clerk shall, in manner hereinbefore mentioned, notify and request the presence of an additional district judge, to sit in the place of the judge or judges so unable to attend.

And the clerk shall continue to so notify and request the presence of the district judges, to attend the terms of this court, in the order of the seniority of their commissions, until each of the district judges of this circuit shall have so participated in the proceedings of the court, and thereafter he shall continue in the same order to so notify and request their presence for the subsequent terms of this court: and provided, also, that if any district judge,

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so notified, informs the clerk of his inability to attend the term at which his presence was requested, then the clerk shall so notify the district judge next in commission, and request his presence.

And if, during any term of this court, less than a full bench should be present for business, then those so present shall determine which of the district judges of the circuit shall be called to attend and sit with them during the absence of those so constituting the court for said term, if the presence of an additional judge be deemed necessary.

Adopted October 19, 1892.

[The following circular relative to the jurisdiction and practice of the court was issued by the clerk of the court:]

INSTRUCTIONS WITH REGARD TO TAKING APPEALS, WRITS OF ERROR, MAKING UP RECORDS, ETC.

Clerk's Office, United States Circuit Court of Appeals—Fourth Circuit.

Richmond, July 1, 1896.

In taking appeals and writs of error, and in making up the transcripts of record to this court, it is necessary that some uniform method shall be followed. Owing to the diverse local practice in the several states of the circuit, there cannot be uniformity while such local practice is adhered to in merely matters of form. These instructions are published with the sanction of the court, and attorneys and clerks are respectfully requested to follow them as to matters of form and practice.

Henry T. Meloney, Clerk.

METHOD OF TAKING APPEALS.

Writs of error and citations are no longer made returnable to the term day of the appellate court, but are made returnable not exceeding 30 days from the day of signing the citation, whether that day, which is the return day, fall in vacation or in term time; and the record must be filed in the clerk's office of this court before the return day, unless the time be enlarged as provided in section 1 of rule 16. In that case the order of enlargement must be filed with the clerk of this court. Rule 11, entitled "Assignment of Errors," requires the plaintiff in error, or appellant, to file with the court below with his petition for the writ of error or appeal, an assignment of errors, etc. This practically abolishes the necessity of pursuing the old method of praying appeals in "open court;" and all appeals and writs of error should be prayed for by petition in writing addressed to the court below, or to the judge in vacation, who allows the writ or the appeal, by an order in writing, approves the appeal or supersedeas bond, and signs the citation. In cases brought up by writ of error, from either the circuit or district courts, the clerk of the circuit court or the clerk of this court issues the writ of error, which writ fixes the return day of the writ to this court, and the citation should bear the same return day. But in

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cases of appeal (in admiralty or in equity) the citation alone fixes the return day.

All appeals, therefore, whether by writ of error or appeal, should hereafter be taken in the following manner:

(1) Petition in writing for the appeal, or writ of error, addressed to the court below, or the judge thereof in vacation.

(2) The petition must be accompanied with an assignment of errors, and a prayer for reversal.

(3) Appeal or writ of error bond, approval thereof, and the signing of the citation by the judge allowing the appeal or writ.

(4) Order in writing of the judge allowing the writ of error or appeal.

(5) Issuing the writ of error by the clerk of the circuit court or of this court.

(6) In case it is desired to have the writ of error issued by the clerk of this court, a certified copy of the petition and order allowing the writ, under the seal of the court, with a fee of $5 for issuing it, must be transmitted to the clerk of this court, and the writ will be issued and forwarded to the clerk of the court below.

All of the above papers and proceedings should be filed with the clerk of the lower court, and incorporated into and certified up in the record by him to this court, except the writ of error and the citation, the originals of which, after having been duly served, must be attached to and bound in the record at their respective places. (For service of writ of error, see section 1007, Rev. St.) Rules of this court, blank writs of error, appeal and supersedeas bonds, citations, and orders of appearance, may be had of the clerks of the lower courts, or of the clerk of this court, upon application.

MAKING UP RECORDS.

In making up a transcript of the record, clerks are requested to make a distinct title or heading to each paper or proceeding copied into the record, with the date of filing the same, or the date of such proceeding, and to write upon but one side of the paper, in a clear, legible hand; and a complete index should be made and attached to the record, at the beginning of it. In order to have uniformity, records should be commenced with the style and the term of the court at which the judgment or decree is entered, after the following form:

The United States of America, ———,
District of ———, to wit:

At a circuit (or district) court of the United States for the ——— district of ———, begun and held at the courthouse in the city of ——— on the first Monday of ———, being the ——— day of the same month, in the year of our Lord one thousand eight hundred and ninety ———.

Present: The Honorable ———,
Circuit Judge.
or
———,
Judge of the ——— District of ———.

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Among other were the following proceedings, to wit:

A. B.	In Equity (or)
vs.	In Admiralty (or)
C. D.	At Law.

Bill of Complaint (or)
Libel (or)
Declaration (or Complaint)
Filed, ———, 189—, (date of filing.)

(Copy same, with indorsements, and any accompanying papers and exhibits, and so on with every paper or proceeding in the case.) Every paper or proceeding should have a distinct heading or title of what it is that follows under it, and the date of the filing of the paper, or of the proceeding. A complete record, as required by rule 14, must be made in all cases, (for record in admiralty cases, see section 6 of that rule;) but as to the general order of making up a record, the following examples are given:

IN EQUITY.

1. Style of court as above.
2. Bill of complaint, etc.
3. Process.
4. Marshal's return.
5. Answer.
6. Replication.
7. Testimony and exhibits for complainant.
8. Testimony and exhibits for defendant.
9. Testimony and exhibits in rebuttal, (if any.)
10. Opinion.
11. Decree.
12. Petition for appeal.
13. Assignment of errors.
14. Appeal bond and approval.
15. Order allowing appeal.
16. Citation.
17. Clerk's certificate.

IN ADMIRALTY.

1. Style of court.
2. Libel.
3. Process.
4. Marshal's return.
5. Claim.
6. Stipulation.
7. Answer.
8. Testimony and exhibits for libelant.
9. Testimony and exhibits for respondent.
10. Testimony and exhibits in rebuttal, (if any.)
11. Opinion.
12. Decree.
13. Petition for appeal.
14. Assignment of errors.
15. Appeal bond and approval.
16. Order allowing appeal.
17. Citation.
18. Clerk's certificate.

AT LAW.

1. Style of court.
2. Declaration.
3. Process.
4. Marshal's return.
5. Plea or demurrer, etc.
6. Joining of issue.
7. Impaneling jury.
8. Verdict.
9. Judgment.
10. Bill of exceptions.
11. Petition for writ of error.
12. Assignment of errors.
13. Bond and approval.
14. Order allowing writ.
15. Writ of error.
16. Citation.
17. Clerk's certificate.

The numerical order of the above list of proceedings may be transposed whenever the order of the proceeding is different. Of course, it is impossible to give information and directions to cover the details of every case, for there are not two cases alike; but the above does cover the substantial parts of every case. While a full record is necessary, yet it is expected that counsel on both sides will exercise care that no matter not necessary to a full and complete review of the case shall be put into the record. Whenever any agreement shall be entered into by counsel with regard to the making up or the printing of the record under rule 23, the agreement must be copied into the record. All records are transmitted to the appellate court by order of the court below; and if such order is not expressed in writing, it is implied, and the clerk should always enter immediately preceding his certificate the following order:

"And thereupon it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United

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States circuit court of appeals for the Fourth circuit; and the same is transmitted accordingly.

"Teste: ——————, Clerk."

Then comes the general certificate of the clerk, in the usual form, that the foregoing is a full and true record, etc., with the seal of the court attached.

DOCKETING CASES AND PRINTING RECORDS.

Upon a record being filed, the case is docketed and put upon the calendar for argument at the next term or adjourned term occurring thereafter, provided the record has been or can be printed 10 days before the said term or adjourned term. Counsel transmitting a record to this court must accompany the same with an order for their appearance for the appellant or plaintiff in error, and also with a deposit of $25 for account of costs of this court. The clerk of this court will, immediately upon a record being filed, send to the counsel an estimate of the cost of printing, which amount must be deposited within 10 days, as provided in rule 23 as amended. A headline at the top of each page, containing the title of the case, should also be printed in the records, so that, when bound in volumes, there shall be, not only uniformity in appearance and style, but the eye will be enabled to catch the particular case at once upon opening the volume. It is important that records should be made up and forwarded to this office as promptly as possible after the appeal or writ is allowed, and not held until the near approach of the next term; especially so when the records are to be printed after filing. It will enable the printer to give more time and attention to the printing, and insure the cases being ready, and the work more correctly done. No record, when once filed, can be withdrawn for the purpose of having it printed elsewhere.

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FIFTH CIRCUIT.

[The rules as originally adopted, where identical with those of the other circuits, will be found at pages cxliii.–clxx. Only such originally adopted rules as were not identical with those of the other circuits, and amendments, changes, and repeals of the rules as originally adopted, are given under this head, reference being made to the others in their proper places.]

1.

[As originally adopted. See page cxliii.]

2.

[As originally adopted. See page cxliii.]

3.

[This rule as originally adopted reads as follows:]

TERMS.

One term of this court shall be held annually at the city of New Orleans on the third Monday of November, and shall be adjourned to such times and places as the court may from time to time designate.

4.

[As originally adopted. See page cxliii.]*

5.

[This rule as originally adopted reads as follows:]

CLERK.

1. The clerk's office shall be kept in the city of New Orleans.

2. The clerk shall not practice, either as attorney or counselor, in this court, or in any other court, while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by section 794 of the Revised Statutes, and shall give bond in the sum of ten thousand dollars ($10,000), and with sureties to be approved by the court, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe-keeping as the court may direct.

* But see rule 36, post, page xcvi.

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4. He shall not permit any original record or paper to be taken from the court room or from the office without an order from the court.

6.

[This rule as originally adopted reads as follows:]

MARSHAL, CRIER, AND OTHER OFFICERS.

1. Every marshal and deputy marshal shall, before he enters on the duties of his appointment, take an oath in the form prescribed by section 782 of the Revised Statutes; and the marshal shall, before he enters on the duties of his office, give bond in the sum of ten thousand dollars ($10,000.00), and with sureties to be approved by the court, for the faithful performance of said duties by himself and his deputies. Said bond shall be filed and recorded in the office of the clerk of the court.

2. The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

7.

[This rule was amended November 23, 1893, so as to read as follows:]

ATTORNEYS AND COUNSELLORS.

All attorneys and counsellors admitted to practice in the supreme court of the United States or any circuit court of the United States, upon filing certificate of such admission with the clerk of this court, and upon taking an oath or affirmation in the following form, viz.: "I, ———, do solemnly swear (or affirm) that I will demean myself as an attorney and counsellor of this court uprightly and according to law, and that I will support the Constitution of the United States," (a copy of which shall also be filed with the clerk), shall become attorneys and counsellors of this court; provided, however, that any attorney or counsellor eligible to admission as an attorney and counsellor of this court may be admitted to practice, on motion, in open court, upon taking the oath or affirmation as prescribed, and subscribing the roll.

No fees shall be charged by the clerk under this rule.

8.

[As originally adopted. See page cxlv.]

9.

[As originally adopted. See page cxlv.]

10.

[As originally adopted. See page cxlv.]

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11.

[As originally adopted. See page cxlvi.]

12.

[As originally adopted. See page cliii.]

13.

[As originally adopted. See page cliii.]

14.

[Paragraph 5 of this rule was amended June 20, 1895, by adding to it the provision appearing below in brackets. The whole rule now reads as follows:]

WRITS OF ERROR, APPEALS, RETURN, AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.*

2. In all cases brought to this court by writ of error or appeal to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.†

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safekeeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding 30 days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.** [Provided, however, that appeals taken from interlocutory decrees under the 7th section of the act entitled, "An act to establish circuit courts of appeal, and define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, as said 7th section is amended by an act approved February 18, 1895, shall be made returnable not exceeding ten days from the day of taking the same.]

* See note 12, page clv. † See note 13, page clvii.
** See note 14, page clviii.

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6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the supreme court.

15.

[As originally adopted. See page clviii.]

16.

[This rule was amended April 23, 1895, by adding to it section 4 below. It was further amended June 20, 1895, by striking out of paragraph 1 the words in brackets. The whole rule now reads as follows:]

DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case, and file the record thereof with the clerk of this court, by or before the return-day, whether in vacation or in term-time.*** But, for good cause shown, [the justice or judge who signed the citation, or] any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court.†† If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed, upon producing a certificate, whether in term-time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case, and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of this court.†††

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and, if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

4. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction for the payment of his fees, or otherwise satisfy him in that behalf.

17.

[As originally adopted. See page clx.]*

*** See note 15, page clix.
†† See note 16, page clix.
††† See note 17, page clix.
* See additional rule 35, page xcvi.

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18.

[As originally adopted. See page clx.]

19.

[As originally adopted. See page clxi.]

20.

[As originally adopted. See page clxii.]

21.

[As originally adopted. See page clxiii.]

22.

[As originally adopted. See page clxiii.]

23.

[Amendment adopted May 11, 1897.]

Ordered, that rule 23 be amended so as to read as follows:

1. The clerk shall, upon the docketing of a case, forthwith cause an estimate to be made of the cost of printing the record and of his fee for preparing it for the printer and supervising the printing, and shall notify the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached for hearing on the regular call of the docket, the case shall be dismissed.

2. The clerk shall cause the record in all cases to be printed forthwith after the payment of such estimate, and shall immediately thereafter furnish to the counsel of each party whose appearance shall have been entered, three copies of the printed record, taking a receipt therefor, and the parties may, by written stipulation filed prior to the printing of the record, agree that only parts of the record shall be printed, and the same may be heard only on the parts so printed, but the court may direct the printing of other parts of the record.

3. The clerk shall not take to the printer the original transcript on file, but shall cause copies to be made for the printer of such original papers sent up under rule 14, or other original papers, as are necessary to be printed.

4. The clerk shall cause at least twenty-five copies of the record to be printed, and may print a larger number on the request of either party on payment of the amount necessary for the printing of such extra copies.

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5. The clerk shall supervise the printing and see that the printed record is properly indexed. He shall distribute the printed copies to the judges of the court and to the reporter from time to time, as required. If the cost of printing the record, together with the clerk's fee for supervising the same, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost and the clerk's fee shall exceed the clerk's estimate, the amount of such excess shall be paid to the clerk before he shall deliver or file the printed record or any copies thereof.

6. In case of reversal, affirmance or dismissal with costs, the amount of the costs of the printing of the record and of the clerk's fee for supervising the same shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

7. The clerk shall receive from either party, and use as parts of the printed record so far as the same may be of proper size and type, any portions which may have been printed in any other court, and also printed copies of patents and exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the costs of printing.

24.

[As originally adopted. See page clxiv.]

25.

[This rule was amended February 27, 1894, so as to read as follows:]

ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. One hour will be allowed for the plaintiff in error or appellant to open and present his case, and one hour will be allowed to the defendant in error or appellee to answer; thirty minutes will then be allowed to the plaintiff in error or appellant to reply. No more time will be allowed for argument without special leave of the court.

26.

[Amendment; the word "records" being stricken out.]

FORM OF PRINTED ARGUMENTS AND BRIEFS.

All arguments and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume.

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27.

[As originally adopted. See page clxvii.]

28.

[As originally adopted. See page clxvii.]

29.

[This rule was amended February 27, 1894, so as to read as follows:]

REHEARING.

A petition for a rehearing after judgment can be presented only during the term at which judgment is entered, and within twenty days after such entry, unless by special leave granted by the court, and must be printed and briefly and distinctly state its grounds without argument, and be supported by certificate of counsel; and will not be granted or permitted to be argued unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

30.

[As originally adopted. See page clxviii.]

31.

[As originally adopted. See, also, order of the supreme court establishing a table of fees for the circuit courts of appeals, page clxxi., post.]

32.

[This rule was amended January 16, 1893, so as to read as follows, the portion in brackets having been added thereby: "In all cases finally determined in this court, a mandate or other proper process in the nature of a procedendo shall be issued, on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain: [provided, that in all cases entitled to precedence in this court under section 7 of the act approved March 3, 1891, the mandate or other proper process may be issued by the clerk after the expiration of seven days from the date of the rendition of the decree of this court, unless otherwise ordered by the court or one of the judges thereof]." It was again amended February 28, 1894, so as to read as follows:]

MANDATE.

Mandates may issue in all cases finally disposed of by this court on application of either of the parties at any time after twenty-one days from the date of decision, unless the court or one of the judges shall in the meantime, grant leave to file a petition for rehearing (adopted February 28, 1894); provided that in all cases entitled to precedence in this court under section 7 of the act approved March 3, 1891, the

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mandate or other proper process may be issued by the clerk after the expiration of seven days from the date of the rendition of the decree of this court, unless otherwise ordered by the court or one of the judges thereof. (Adopted January 16, 1893.)

33.

[As originally adopted. See page clxx.]

34.

[As originally adopted. See page clxx.]

35.

[The following new rule was adopted June 23, 1892:]

ORDER IN RELATION TO ASSIGNMENT OF CASES FOR HEARING.

Thirty days prior to the opening of the regular session of the court, the clerk is directed to assign cases for hearing during the first month of the term at the rate of two cases per day for the first three days of each week. Any cases entitled by law to preference in hearing shall be first assigned, and thereafter causes shall be grouped by states, and assignments made so as to permit the hearing of causes from one state before the causes from the next state in order shall be called.

36.

[The following rule was adopted June 23, 1892:]

It is ordered that, whenever a full bench of three judges shall not be made up by the attendance of the associate justice of the supreme court assigned to the circuit and of the circuit judges, so many of the district judges in the order of seniority of their respective commissions, and qualified to sit, as may be necessary to make up a full court of three judges, are hereby designated and assigned to sit in this court: provided, however, that the court may at any time, by particular assignment, designate any district judge to sit as aforesaid.

37.

[The following rule was adopted June 11, 1897:]

WRITS OF ERROR IN CRIMINAL CASES.

1. Writs of error to review criminal cases tried in any district or circuit court of the United States within this circuit, which may be reviewed under the provisions of the act of March 3, 1891, creating this court, and the act of congress amendatory thereof, approved January 20, 1897, may be allowed in term time or in vacation by the circuit justice assigned to this circuit, by either of the circuit

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judges. or by any district judge who presided on the trial, and the proper security be taken, and the citation be signed by him, and he may also grant a supersedeas and stay of execution or proceedings pending the determination of such writ of error.

2. Where such writ of error is allowed in any criminal case as aforesaid, the circuit court or district court, before which the accused was tried, or the trial judge, or the circuit justice assigned to the circuit, or either of the circuit judges, shall have the power, after the citation has been duly served, to admit the accused to bail in such amount as may be fixed, such bail bond to be, as near as may be, in the form prescribed in the appendix to these rules.

APPENDIX TO RULE 37.

[Form of Appearance Bond on Writ of Error in Criminal Cases.]

Know all men by these presents:

That we, ——, as principal, and ——, as sureties, are held and firmly bound unto the United States of America in the full and just sum of —— dollars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this —— day of ——, in the year of our Lord one thousand eight hundred and ninety ——.

Whereas, lately at the —— term, A. D. 189—, of the —— court of the United States for the —— district of ——, in a suit pending in said court between the United States of America, plaintiff, and ——, defendant, a judgment and sentence was rendered against the said ——, and the said —— has obtained a writ of error from the United States circuit court of appeals for the Fifth circuit, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States circuit court of appeals for the Fifth circuit, at the city of New Orleans, Louisiana, thirty days from and after the date of said citation, which citation has been duly served.

Now, the condition of the above obligation is such that if the said —— shall appear in the United States circuit court of appeals for the Fifth circuit on the first day of the next term thereof, to be held at the city of ——, on the first Monday in ——, A. D. 189—, and from day to day thereafter during said term, and from term to term, and from time to time, until finally discharged therefrom, and shall abide by and obey all orders made by the said United States circuit court of appeals for the Fifth circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence of the said —— court against him shall be affirmed by the said United States circuit court of appeals for the Fifth circuit, then the above obligation to be void; else to remain in full force, virtue, and effect.

——— [Seal.]
——— [Seal.]
——— [Seal.]

Approved:

———,
Judge of the ——.

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SIXTH CIRCUIT.

[The rules as originally adopted, where identical with those of the other circuits, will be found at pages cxliii.-clxx. Only such originally adopted rules as were not identical with those of the other circuits, and amendments, changes, and repeals of the rules as originally adopted, are given under this head, reference being made to the others in their proper places.]

1.

[As originally adopted. See page cxliii.]

2.

[As originally adopted. See page cxliii.]

3.

[This rule, as originally adopted, appears in 11 C. C. A., page lxv., with amendments made before the preparation of that volume. It was further amended October 8, 1894 (see 14 C. C. A. iv.), April 2, 1895 (see 12 C. C. A. iv.), and February 10, 1896 (see 76 Fed. iii.). The rule, after these several amendments, reads as follows:]

TERMS AND HEARINGS OF CASES.

One term of this court shall be held annually on the Tuesday after the first Monday of October, and adjourned sessions on the Tuesday after the first Monday of each other month in the year except August and September.

All sessions of the court shall be held at Cincinnati unless otherwise especially ordered by the court.

At the October, February and May sessions of the court, hereafter referred to as calendar sessions, there shall be a regular and peremptory call of a calendar containing all the cases upon the docket which under the rules should then be ready for hearing.

At other than calendar sessions, except the June and July sessions, the court will hear any case upon the docket in which the record has been printed and briefs for both parties filed, provided that there has been also filed in the clerk's office on the Monday preceding the first day of such session the written consent of counsel for both parties that such hearing may be had.

At other than calendar sessions the court, on motion, will also hear appeals from interlocutory orders granting preliminary injunctions, appeals or writs of error in any cause given priority by the statutes of the United States, and appeals from orders in habeas corpus proceedings, where the petitioner is in jail, provided that the record has been printed and the brief of the moving party and due notice of the motion have been filed with opposing counsel at least six days before the opening day of the session.

Appeals in habeas corpus cases when the petitioner is in jail

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will be heard at any time when the court is in session after the record has been printed and the brief for the petitioner has been filed with opposing counsel six days before the day set for the hearing of the motion.

At other than calendar sessions, the court will also hear all motions, and miscellaneous business, and will announce opinions.

For good cause shown, on motion of either party, the court may advance any cause upon the docket to be heard at any session, whether calendar or otherwise, even though the time permitted under the rules for the filing of briefs may not have expired at the day set for hearing. Such motions for the advancement of causes will only be heard by the court upon five days previous notice to opposing counsel.

4.

[As originally adopted. See page cxliii.]

5.

[As originally adopted. See page cxliv.]

6.

[This rule was amended October 22, 1894, so as to read as follows:]

MARSHAL, CRIER AND OFFICERS.

1. The crier and bailiffs of the court shall, before they enter on their duties, take an oath in the form prescribed by section 782 of the Revised Statutes.

2. The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

7.

[This rule, as originally adopted, appears in 11 C. C. A. lxvi. It was amended October 2, 1894, so as to read as follows:]

ATTORNEYS AND COUNSELLORS.

All attorneys and counsellors permitted to practice in the supreme court of the United States or in any circuit court of the United States shall become attorneys and counsellors in this court on taking an oath or affirmation as prescribed by rule 2 of the supreme court of the United States and upon subscribing the roll.

The fee for such admission shall be $10 in accordance with the table of fees as prepared by the supreme court of the United States.

Every person taking the oath and paying such fee shall be entitled to a certificate of his admission, signed by the clerk.

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8.

[As originally adopted. See page cxlv.]

9.

[As originally adopted. See page cxlv.]

10.

[As originally adopted. See page cxlv.]

11.

[As originally adopted. See page cxlvi.]

12.

[As originally adopted. See page cliii.]

13.

[As originally adopted. See page cliii.]

14.

[As originally adopted. See page clv.]

15.

[As originally adopted. See page clviii.]

16.

[As originally adopted. See page clix.]

DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case, and file the record thereof with the clerk of this court, by or before the return-day, whether in vacation or in term-time. But, for good cause shown, the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed, upon producing a certificate, whether in term-time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case, and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff

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in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

And at the time of filing the record, the plaintiff in error or appellant shall deposit with the clerk the sum of thirty dollars as security for costs, except in cases in which the proper showing is made and an order of this court is entered thereon allowing the cause to proceed in forma pauperis.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and, if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

17.

[This rule was amended October 22, 1894, so as to read as follows:]

DOCKET.

The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such dockets shall be called at every calendar session, as provided in rule 3. And if a case is called for hearing at two calendar sessions successively, and upon the call at the second session neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

18.

[As originally adopted. See page clx.]

19.

[As originally adopted. See page clxi.]

20.

[As originally adopted. See page clxii.]

21.

[As originally adopted. See page clxiii.]

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22.

[The portion of the rule in brackets was added by amendment, June 22, 1893. Otherwise the rule reads as originally adopted.]

PARTIES NOT READY.

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial* the defendant may have the plaintiff called, and the writ of error or appeal dismissed.

2. Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

3. When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

[4. All causes shall stand for hearing when the time allowed for printing the records and the briefs of both parties shall have expired: provided, however, that causes may be heard when the records and briefs therein are printed, though the time allowed for printing records and briefs may not have expired.]

23.

[This rule, with amendments down to the time of preparing 11 C. C. A. for the press, appears on page lxviii. thereof. It was further amended October 8, 1894 (see 14 C. C. A. vi.), December 13, 1895 (see 20 C. C. A. iii.), and February 10, 1896 (see 76 Fed. iii.). Paragraph 8 of the amendment adopted October 8, 1894, establishing the clerk's fees for preparing records, is repealed by the order of the supreme court establishing a table of fees for the circuit courts of appeals. See page clxxi., post. After these amendments, the rule reads as follows:]

PRINTING RECORDS.

1. The clerk shall supervise the printing of all records, and upon the docketing of a case shall forthwith cause an estimate to be made of the cost of printing the record and his fee for preparing it for the printer and for supervising the printing thereof, and shall at once notify the attorney for the plaintiff in error, or appellant, of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid the writ of error, or appeal, may be dismissed upon the motion of the opposite party or by the court of its own motion.

2. After the payment to him of such estimate the clerk shall cause at least twenty-five (25) copies of the record to be printed forthwith, shall file the same and shall furnish to each of the respective parties three (3) copies thereof, and take a receipt therefor.

3. Parties may agree by written stipulation filed with or prior to the filing of the record that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record.

* See note 19, page clxiii.

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The plaintiff in error or appellant may, within 10 days after the case shall be docketed in this court, file with the clerk a statement of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party, within 15 days after service of such statement, may designate in writing, filed with the clerk, additional parts of the record which he thinks material, and if he shall not do so he shall be held to have consented to the hearing of the parts designated by the plaintiff in error or appellant.

If parts of the record shall be so designated by one or both parties, the clerk shall print those parts only, and the court will consider nothing but those parts of the record.

If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed or such other order made as the circumstances may appear to the court to require.

If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made which the court shall think proper.

If good cause be shown the time within which the statement of the parts of the record is to be filed with the clerk by either party, as above limited, may be enlarged by the court in session or by either circuit judge if eligible to sit in the cause.

4. If the cost of printing and supervision shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying the same. If the cost is greater than the estimate the amount of such excess shall be paid to the clerk before he shall file the printed record or deliver any copies thereof.

5. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing and supervision shall be taxed against the party against whom the costs are given, and shall be inserted in the mandate or other proper process.

6. In any case where the record shall have been printed in the court below either circuit judge may, on the written application of the plaintiff in error or appellant, order that such printed record be used in this court. In such case the judge shall require as a condition of making the order, a certificate of the clerk of this court that the record is in accordance with the printing rules and is properly indexed, in which case the supervision fee, provided in paragraph 7 of rule 31, shall be charged and collected by the clerk.

7. The clerk of this court shall receive proposals for printing, which shall be submitted to the senior circuit judge, who may in his discretion award such printing to the lowest and best bidder, and all such printing shall be done by the person to whom the same is so awarded. And when a case shall be heard upon a record printed in the court below the cost for printing shall be taxed on the basis of such bid for printing, except when the parties otherwise agree.

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24.

[This rule, with amendments down to the time of preparing 11 C. C. A. for the press, appears on page lxix. thereof. It was further amended February 25, 1895, so as to read as follows:]

BRIEFS.

1. The counsel for the plaintiff in error shall file with the clerk of this court within twenty-five days after the filing of the printed copies of the record, as required in rule 23 as amended, twenty copies of a printed brief, one of which shall on application be furnished to each of the counsel engaged upon the opposite side.*

2. This brief shall contain, in order here stated:

(1) A concise abstract, or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point.† When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief, within forty days after the filing of the printed record, as required by rule 23. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no statement of the case shall be required, unless that presented by the plaintiff in error or appellant is controverted.

4. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default he will not be heard, except on consent of his adversary, and by request of the court.

5. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

25.

[As originally adopted. See page clxvi.]

26.

[This rule was amended January 16, 1892, so as to read as follows: "Form of printed records, arguments, and briefs. All records, arguments, and briefs printed for the use of this court shall be in small pica type, twenty-four pica ems to a line, thirty-five lines to a page, leaded with four-to-pica leads, with an index and a suitable cover containing the title of the court

* See note 21, page clxiv. † See note 24, page clxv.

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and cause, the court from which the case is brought into this court, and the number of the case. Size of pages to be 9¼x6¼ inches, except that in patent cases the size of the pages shall be 10¾x7⅝ inches; that is to say, large enough to bind in copies of patent-office drawings and specifications without folding. Records printed in the courts below may be filed and used in this court if they conform to this rule." It was again amended January 2, 1894, so as to read as follows:]

FORM OF PRINTED RECORDS, ARGUMENTS, AND BRIEFS.

1. All records shall be of a uniform size, printed in small pica type, 24 pica ems to a line, 48 lines to a page, solid, with an index, and a suitable cover containing the title of the court and cause, the court from which the case is brought to this court, and the number of the case; size of pages to be 9¼x6¼ inches, except that in patent cases the size of the pages shall be 10¾x7⅝ inches; that is to say, large enough to bind in copies of patent-office drawings and specifications without folding.

2. All arguments and briefs of attorneys shall be printed, and conform as near as practicable to the size of the printed record.

27.

[As originally adopted. See page clxvii.]

28.

[This rule as originally adopted appears in 11 C. C. A., page lxxi. It was further amended October 22, 1894, so as to read as follows. Paragraph 4 of the amendment, establishing the clerk's fees for opinions of the court, has been repealed by the order of the supreme court establishing a table of fees for the circuit courts of appeals, see page clxxi., post.]

OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.

2. The opinions of the court shall be printed under the supervision of the clerk by the printer to whom the court printing has been awarded in accordance with paragraph 7, rule 23.

3. Opinions printed under the supervision of the clerk need not be copied into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

4. The cost of printing the opinions shall be defrayed out of the amount received for the same, and any deficit shall be paid out of such fees collected by the clerk as are not properly taxable as costs in any case pending in the court.

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29.

[Amendment adopted June 22, 1893.]

REHEARING.

A petition for rehearing after judgment can be presented only within thirty days after the day when the printed opinion of the court is returned by the printer to the clerk, and can be obtained by counsel for the parties, (which date the clerk shall note upon the appearance docket), unless by special leave granted during such thirty days; and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel;* and will not be granted or permitted to be argued unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

30.

[As originally adopted. See page clxviii.]

31.

[As originally adopted. See page clxviii.]

32.

[This rule as amended June 22, 1893, appears in 11 C. C. A., page lxxi. It was further amended October 2, 1894, so as to read as follows:]

MANDATE.

In all cases finally determined in this court, a mandate or other proper process in the nature of a procedendo shall be issued, on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.†

Such mandate shall not issue until time has elapsed for filing a petition to rehear as defined by rule 29; and no mandate or other process of procedendo shall issue when a petition to rehear is pending, unless specially ordered.

Every mandate shall be accompanied by a copy of the opinion filed in the cause in which it is issued, and the charge for the same shall be taxed in the costs of the case.

33.

[As originally adopted. See page clxx.]

34.

[As originally adopted. See page clxx.]

* See note 25, page clxvii.

† See note 28, page clxx.

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35.

[This additional rule was adopted June 22, 1893:]

TESTIMONY IN ADMIRALTY CASES AFTER APPEAL.*

In admiralty appeals no testimony shall be taken except under a commission issued from this court to a clerk of a United States court or a United States commissioner, by direction of the court, the circuit justice, or either circuit judge, qualified to sit on appeal in said case, after cause shown to such court, justice, or judge that such evidence is material and necessary, and could not by due diligence have been produced at the original hearing. Such testimony shall be taken only upon interrogatories settled by such court, justice, or judge, upon at least ten days' previous notice to the opposing party or his attorney (accompanied with a copy of the proposed interrogatories), and upon cross interrogatories to be settled at the same time after five days' previous notice of the same, with copy thereof, to be served upon counsel offering testimony.

36.

[This additional rule was promulgated October 2, 1894:]

DISPOSITION OF FEES NOT COSTS IN CASES.

All fees collected by the clerk which are not properly taxable as costs in any case pending in the court and which are not by law required to be deposited by him in the treasury of the United States, after the payment of any deficit arising from the printing of opinions, shall constitute a fund to be expended in the purchase of law books for the library of the court by the clerk, under the direction of the court. And it shall be the duty of the clerk to render to the court for its examination and approval a quarterly account of such fees received and disbursed by him.

37.

[This additional rule was promulgated October 22, 1894:]

CALL AND ORDER OF THE DOCKET.

1. The court on the first day of each calendar session will begin calling the cases for argument in the order in which they stand on the docket and proceed from day to day during the session in the same way. If the parties or either of them shall be ready when the case is called, the same will be heard, and if neither party shall be

* Rules of practice in admiralty appeals were promulgated in the Second circuit May 20, 1892, as "Rules in Admiralty" (see page lxvii., ante), and in the First circuit as amendments to rule 14 (see pages liii.–lv., ante).

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ready to proceed with the argument, the case will be continued to the next calendar session.

2. Each day's calendar shall consist of the six cases next in order after the case last submitted on the previous day, but the calendar will not include any case continued or passed by the court or stipulation of counsel before the adjournment of court on the previous day. The calendar for each day shall be exhibited in the clerk's office at the adjournment of court on the previous day. Counsel choosing to rely on the judgment of the clerk as to the probable time of the hearing of any case, otherwise than as shown in the day's calendar above provided for, must do so at their own risk.

3. Two or more cases involving the same question may by leave of the court be heard together, but they must be argued as one case.

38.

[Adopted, March 21, 1897.]

1. An appeal or writ of error from a circuit court or a district court to this court in the cases provided for in sections 6 and 7 of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, and acts to amend said act approved February 18, 1895, and January 20, 1897, may be allowed in term time or vacation by the circuit justice or by either circuit judge within the circuit or by any district judge within his district and the proper security be taken and the citation be signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.

2. Where such writ of error to this court is allowed in the case of a conviction of an infamous crime or in any other criminal case in which it will lie, the circuit court or district court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

Promulgated March 21, 1897.

NOTE.

In the Matter of the Adoption of a Rule for Bailing Defendants Convicted of Crime Pending a Writ of Error to the Judgment.

Mr. Ed. Baxter, a special assistant United States attorney, appointed for the prosecution of certain persons charged with the violation of the national banking act in the Middle district of Tennessee, submitted the following suggestions upon the power and duty of this court to adopt a rule similar to rule No. 36 of the rules of the supreme court of the United States:

Marcus A. Spurr was convicted on three indictments in the United States circuit court for the Middle district of Tennessee for violating certain provisions of the national banking act. The verdict was rendered in April, 1896. The sentence upon the verdict was not pronounced until December, 1896. After the sentence, and before a writ of error was sued out, an act of congress was approved January 20, 1897, depriving the supreme court, and conferring upon the circuit court of appeals, jurisdiction to entertain a writ of error in Spurr's Case. The act of January 20, 1897, confers no express power upon the circuit court of appeals to make any order or rule relative to a defendant in a criminal case, giving bond pending a writ of error to that court; and the

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object of this letter is to ascertain whether the court is of opinion that it has the power to make a rule similar to rule 36 of the supreme court.

I respectfully submit for your consideration the following suggestions:

The act creating the circuit court of appeals contains the following provisions, viz.: "Such court shall prescribe * * * the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction as shall be conferred by law." 1 Desty, Fed. Proc. (8th Ed.) p. 458, § 168. "The court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law." Id. p. 459, § 169. "All provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect to the circuit court of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit court of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively." Id. pp. 467, 468, § 184. "The circuit court of appeals shall have the powers specified in section seven hundred and sixteen of the Revised Statutes of the United States." Id. p. 468, § 185. Section 716 of the Revised Statutes of the United States is as follows: "The supreme court and the circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

In the case of U. S. v. Hudson, 65 Fed. 68, Judge Parker intimated, if he did not decide, that the supreme court had no power to make rule 36, par. 2. His decision was, in effect, reversed in the case of Hudson v. Parker, 156 U. S. 277, 15 Sup. Ct. 450. The supreme court seems to have rested its power upon section 917 of the Revised Statutes, notwithstanding the concluding clause of that section would indicate that it was confined to "suits in equity or admiralty." 156 U. S. 282, 15 Sup. Ct. 452. The supreme court lays stress upon the following language quoted from section 917 of the Revised Statutes: "The supreme court shall have power to prescribe from time to time and in any manner not inconsistent with any law of the United States the forms of writs and other process;" and, under that language, the court held that it had power "to regulate the manner of proceeding, or 'mode of process' in taking bail upon writs of error" from that court to the circuit court or district court in civil or criminal cases. 156 U. S. 282, 15 Sup. Ct. 452. The court then refers to the fact that by section 11 of the act creating the circuit court of appeals, "all provisions of law, now in force, regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit court of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error." The court then adds: "But as to the methods and system of review, through appeals or writs of error, including the citations, supersedeas, and bond or other security, in cases, either civil or criminal, brought to this (supreme) court from the circuit court or the district court, congress made no provision in this act, evidently considering those matters to be covered and regulated by the provisions of earlier statutes forming parts of one system." 156 U. S. 282, 15 Sup. Ct. 452.

If the supreme court, prior to the passage of the act creating circuit courts of appeals, under its power to prescribe from time to time "the forms of writs and other process," had the power "to regulate the manner of proceeding, or mode of process, in taking bail upon writs of error from this [supreme] court to the circuit court or district court, in civil or criminal cases," it seems to me that by section 11 of the act creating circuit courts of appeals, whatever power the supreme court then possessed, under the provisions of law then in force, to regulate the manner of proceeding or mode of process in taking bail in criminal cases upon writs of error from that court, was by

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said section 11 conferred upon the circuit courts of appeals, in reference to taking bail upon writs of error in criminal cases from those courts. I understand that the act creating circuit courts of appeals gives to those courts appellate jurisdiction in all criminal cases except where the conviction was of a capital or otherwise infamous crime; and the act of January 20, 1897, having conferred upon those courts appellate jurisdiction of infamous crimes, they now have the same power to regulate the manner of proceeding or mode of process in taking bail upon writs of error from those courts to the circuit court, in cases of infamous crimes, that the supreme court had prior to the passage of said act. Again, it seems to me that the power expressly given to circuit courts of appeals to prescribe "the form of writs, and other process and procedure as may be conformable to the exercise of its jurisdiction as shall be conferred by law," is fully as broad as the power conferred upon the supreme court under section 917 of the Revised Statutes, and under which section that court held that it had the power to regulate the taking of bail upon writs of error from that court in criminal cases. 1 Desty, Fed. Proc. (8th Ed.) p. 458, § 168. Again, the power expressly given to circuit courts of appeals "to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law" seems to me to clearly include the power to regulate the taking of bail upon writs of error issued from that court to the circuit court in criminal cases. After a writ of error shall have issued, and the citation shall have been served, the criminal case comes within the jurisdiction of the circuit court of appeals, and that court must necessarily have the power to determine all questions relating to the bail of a defendant thus placed within its jurisdiction. Id. p. 459, § 169; 156 U. S. 285, 15 Sup. Ct. 453. Again, circuit courts of appeals have the powers specified in section 716 of the Revised Statutes of the United States. That statute gives to them power to issue all writs which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. 1 Desty, Fed. Proc. (8th Ed.) p. 468, § 185. It seems to me that, under that section, the court not only has the power to issue a writ of error to the circuit court in an infamous criminal case, but that it has the power, in issuing such a writ, to regulate the taking of bail from the defendant for his appearance in the circuit court of appeals as a thing necessary to be done for the proper exercise of the jurisdiction of that court.

It is said by the supreme court, in the case of Hudson v. Parker, that the statutes of the United States have been framed upon the theory that a person accused of crime shall not be compelled to undergo punishment pending a writ of error. 156 U. S. 285, 15 Sup. Ct. 453. As the act of January 20, 1897, has taken away from the supreme court all power to regulate the taking of bail in cases of infamous crime, it must have been the intention of congress to confer the power upon the circuit courts of appeals; for otherwise it would not have the power to authorize a defendant to be bailed, notwithstanding the fact that it is "agreeable to the usages and principles of law" that a defendant shall be bailed pending a writ of error. Again, it seems to me that the same power which authorized the court to make rules 13 and 33 would authorize it to make a rule similar to rule 36 of the supreme court. 16 U. S. App. Append. 733, 744, 31 C. C. A. cliii., clxx., and 78 Fed. cxv., cxxvi.

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SEVENTH CIRCUIT.

[The rules as originally adopted, where identical with those of the other circuits, will be found at pages cxliii.–clxx. Only such originally adopted rules as were not identical with those of the other circuits, and amendments, changes, and repeals of the rules as originally adopted, are given under this head, reference being made to others in their proper places.]

1.

[As originally adopted. See page cxliii.]

2.

[As originally adopted. See page cxliii.]

3.

[This rule as originally adopted read as follows: "Terms. A term of this court shall be held annually at the city of Chicago on the first Monday in October, and continue until the first Monday in October of the succeeding year. Each term shall be adjourned to such times and places as the court may from time to time designate. The first regular term shall commence on the first Monday in October, 1891." It was amended March 29, 1894, so as to read as follows:]

TERMS.

A term of this court shall be held annually, at the city of Chicago on the first Monday in October, and continue until the first Monday in October, of the succeeding year. Every term shall be adjourned to such times and places as the court may from time to time designate. Unless otherwise specially ordered, the court will hold three sessions for the hearing of causes during each term, beginning on the first Monday in October, the first Monday in January and the first Monday in May, respectively.

4.

[As originally adopted. See page cxliii.]

5.

[As originally adopted. See page cxliv.]

6.

[As originally adopted. See page cxliv.]

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7.

[This rule was amended June 1, 1895, so as to read as follows:]

ATTORNEYS AND COUNSELORS.

All attorneys and counselors admitted to practice in the supreme court of the United States, or in any circuit court of the United States, shall become attorneys and counselors in this court on taking an oath or affirmation in the form prescribed by rule 2 of the supreme court of the United States, and on subscribing the roll. The clerk shall be entitled to a fee of ten dollars for each such admission, and a certificate thereof in accordance with the table of fees prepared by the supreme court of the United States.

8.

[As originally adopted. See page cxlv.]

9.

[As originally adopted. See page cxlv.]

10.

[As originally adopted. See page cxlv.]

11.

[As originally adopted. See page cxlvi.]

12.

[As originally adopted. See page cliii.]

13.

[As originally adopted. See page cliii.]

14.

[Amendment adopted March 29, 1894.]

WRITS OF ERROR, APPEALS, AND RETURN, AND RECORD.

1. The clerk of the court, to which any writ of error may be directed, shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and seal of the court.*

* See note 12, page clv.

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2. In all cases brought to this court, by writ of error or appeal to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.†

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the date on which the appeal is allowed, the writ of error issued, or the citation signed, whether the return day fall in vacation or in term time, and be served before the return day.††

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the supreme court.

15.

[As originally adopted. See page clviii.]

16.

[As originally adopted. See page clix.]

17.

[Amendments adopted May 24, 1893, and March 29, 1894. By the latter amendment, only the words in brackets were added.]

DOCKET.

The clerk shall prepare calendars of causes for the regular terms of this court, to be held on the first Monday of October in each year, and calendars for each adjourned term of the court, placing thereon in proper chronological order only causes in which the record shall have been printed fully thirty days before such term or such adjourned term, and those causes in which, the record having been printed, briefs upon both sides have been filed [seven days before the beginning of such term or adjourned term.]

† See note 13, page clvii.

†† There is no rule in the seventh circuit requiring the citation to be returnable to or before the next ensuing term of the circuit court of appeals. Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co. (7th Circuit) 19 C. C. A. 477, 73 Fed. 314. See, also, note 14, page clviii.

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18.

[As originally adopted. See page clx.]

19.

[As originally adopted. See page clxi.]

20.

[As originally adopted. See page clxii.]

21.

[As originally adopted. See page clxiii.]

22.

[As originally adopted. See page clxiii.]

23.

[This rule, with its changes down to the time of preparing 11 C. C. A. for the press, is shown on page lxxvi. thereof. It was further amended, as to paragraph 11, June 1, 1895; after which the whole rule reads as follows:]

PRINTING THE RECORD.

1. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to be approved by the clerk, for the payment of all costs which shall be incurred in the cause.

2. The clerk shall, upon the docketing of a case, forthwith cause an estimate to be made of the cost of printing the record and of his fees for preparing it for the printer and for supervising the printing thereof, and shall at once notify the attorney for the plaintiff in error, or appellant, of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid, the writ of error or appeal may be dismissed upon the motion of the opposite party, or by the court of its own motion.

3. The clerk shall cause the record in all cases to be printed forthwith after the payment of such estimate,** and shall immediately

** On a motion to dismiss argued a little over a month after the appeal was perfected, *held*, that it was no ground of dismissal in the seventh circuit that the record had not yet been printed or any briefs filed; there being no allegation that appellant had failed to give the required undertaking for costs, or to pay the clerk the estimated costs and fees for printing the record, or to file a brief within 20 days after delivery by the clerk of the printed record. Rules 14, 23, 24, seventh circuit. Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co. (7th Circuit) 19 C. C. A. 477, 73 Fed. 314.

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thereafter furnish to each of the respective parties at least three copies of the printed record, taking a receipt therefor, and the parties may, by written stipulation filed with or prior to the filing of the record, agree that only parts of the record shall be printed, and the case may be heard only on the parts so printed, but the court may direct the printing of other parts of the record.

4. The clerk shall cause at least twenty-five copies of the record to be printed, and may print a larger number on the request of either party on payment of the amount necessary for the printing of such extra copies.

5. The clerk shall supervise the printing, and see that the printed record is properly indexed. He shall distribute the printed copies to the justices of the court from time to time, as required. If the cost of printing the record, together with the clerk's fee for supervising the same, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost and the clerk's fee shall exceed the clerk's estimate, the amount of such excess shall be paid to the clerk before he shall deliver or file the printed record or any copies thereof.

6. In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of the printing of the record and of the clerk's fee for supervising the same shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

7. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties or attorneys, of having served a copy of the bill of fees due from them, respectively, in this court on such parties, their sureties or attorneys, an attachment shall issue against such parties or their sureties, respectively, to compel the payment of said fees.

8. The clerk shall adopt a uniform size for the printing of all records, and the same shall be printed in small pica type, on clear white paper, with a margin of not less than an inch and a half, and show by a note or memorandum the time when each pleading or document was filed, and the printed record shall also contain running titles of its contents.

9. The briefs of attorneys shall also be printed, and conform as nearly as practicable to the size of the printed record.

10. The clerk shall, on or before the conclusion of each case, collect and file, or otherwise preserve together, one copy of the printed record, and of each brief, printed motion, and argument submitted in each case.

11. In any case where the record shall have been printed in the court below, the presiding judge may, on the application of the plaintiff in error or appellant, order that such printed record be used in place of the printing hereinbefore provided for. But the clerk shall prepare and cause to be printed and attached to the printed record an index thereof, and shall be paid the same fees for the indexing and supervision of such printed record as if printed under his personal supervision.

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12. The clerk of this court shall advertise for proposals for the printing hereinbefore provided for, which proposals shall be submitted to the senior circuit judge of the court, who shall award such printing to the lowest and best bidder, and all such printing shall be done by the person to whom the same is so awarded. And, when a case shall be heard upon the record printed in the court below, the costs for printing shall be taxed on the basis of such bid for printing, except when the parties otherwise agree.

13. The fees of the clerk of this court shall be the same as those of the clerk of the supreme court for the same services, which are at present designated by the supreme court rule 24.

24.

[Amendments adopted May 24, 1893, and March 29, 1894. The latter amendment only substituted the word "twenty" for the word "fifteen" in sections 1 and 3.]

BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court, within twenty days after the date of the delivery by the clerk of the printed record, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.***

2. This brief shall contain, in order here stated:*

(1) A concise abstract or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2) A specification of the errors relied upon,† which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and, in cases brought up by appeals, the specifications shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused.†† When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report, and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may

*** See note (**) to rule 23, page cxiv., supra.

* See note 21, page clxiv.

† Each specification of the brief should conform substantially to the particular assignment of error on which it is based. Vider v. O'Brien (7th Circuit) 10 C. C. A. 385, 62 Fed. 326.

†† See note 23, page clxv.

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be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief within twenty days after the filing of the brief of the plaintiff in error or appellant. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted. Either party may, at or before the argument of the cause, file a supplemental brief strictly confined to matter in reply to the brief of the opposite party.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and, when a defendant in error or an appellee is in default, he will not be heard except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but, if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

25.

[Amendment adopted May 24, 1893.]

ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But, when there are cross appeals, they shall be argued together as one case; and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side, at their discretion: provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

4. Reading at length from briefs or reported cases shall not be indulged.

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26.

[This rule as originally adopted was repealed October 8, 1891, by additional rule 35, and rule 28 as originally adopted was amended by changing its number from 28 to 26, so that rule 26, as existing at present, reads as follows:]

OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records, but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and, when so bound, they shall be deemed to have been recorded, within the meaning of this rule.

27.

[This rule as originally adopted was repealed October 8, 1891, by additional rule 35, and rule 29 as originally adopted, and amended October 27, 1892, was further amended May 24, 1893, by changing its number from 29 to 27, and adding the words in brackets, so as to read as follows:]

REHEARING.

A petition for rehearing must be filed within thirty days after entry of judgment or decree [or after filing of the opinion,] shall be in print, and be served forthwith by copy upon the opposing party, who, within twenty days from such service, may file a printed answer;* and the petition shall be determined without oral arguments, unless otherwise ordered. If a petition be not filed within the time allowed, or upon the overruling of a petition, the clerk shall, without special order, issue the mandate of the court to the court below. Ten copies of such petition or answer shall be filed with the clerk of this court.

28.

[This rule as originally adopted having been amended by changing its number to 26, rule 30 as originally adopted was amended by changing its number from 30 to 28, so that the present rule 28 reads as follows:]

INTEREST.

1. In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, and at the same rate that similar judgments bear interest in the courts of the state or territory where such judgment was rendered.†

* See note 25, page clxvii. † See note 26, page clxviii.

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2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded on the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases of equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed, if specially directed by the court.

29.

[This rule as originally adopted and amended having been further amended by changing its number to 27, rule 31 as originally adopted was amended by changing its number from 31 to 29, so that present rule 29 reads as follows:]

COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.*

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

6. In all cases certified to the supreme court, or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the supreme court.**

* See note 27, page clxix.

**See order of the supreme court establishing a table of fees for the circuit courts of appeals, page clxxi., post.

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30.

[This rule as originally adopted having been amended by changing its number to 28, rule 32 as originally adopted was amended by changing its number from 32 to 30, so that present rule 30 reads as follows:]

MANDATE.

In all cases finally determined in this court, a mandate or other proper process in the nature of a procedendo shall be issued on the order of this court to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.†

31.

[This rule as originally adopted having been amended by changing its number to 29, rule 33 as originally adopted was amended by changing its number from 33 to 31, so that present rule 31 reads as follows:]

CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in the custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

32.

[This rule as originally adopted having been amended by changing its number to 30, rule 34 as originally adopted was amended by changing its number from 34 to 32, so that present rule 32 reads as follows:]

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, and in any case pending in this court on writ of error or appeal, shall be placed in the custody of the marshal of this court at least ten days before the case is heard or submitted.

2. All models, diagrams, and exhibits of material placed in the custody of the marshal for the inspection of the court on the hearing of a case must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise,

† See note 28, page clxx.

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of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

33.

[This rule as originally adopted having been amended by changing its number to 31, additional rule 36, adopted October 8, 1891, was amended by changing its number from 36 to 33, and otherwise, so that present rule 33 reads as follows:]

CLERK'S REPORTS.

The clerk shall keep an accurate account of all moneys received by him for fees in cases pending in the court, and shall deposit the same in a national bank, to be designated by the senior circuit judge; and, as often as once in three months, he shall submit to the court a detailed report showing all moneys received by him for fees since the last report, and all moneys paid out, if any.

34.

[This rule, as originally adopted, having been amended by changing its number from 34 to 32, was again amended June 1, 1895, by the adoption of the following:]

All fees collected by the clerk, which are not properly taxable as costs in any case, and which are not by law required to be by him deposited in the treasury of the United States, after the payment of any deficit arising from the printing of opinions shall constitute a fund to be expended in the purchase of law books for the library of the court, by the clerk, under the direction of the court.

It shall be the duty of the clerk to render to the court for its examination and approval a quarterly account of such fees received and disbursed by him.

35.

[This additional rule, adopted October 8, 1891, amending rule 23, and repealing rules 23, 26, and 27, read as follows:

["It shall be the duty of the clerk to cause the record in all cases to be printed at least six days before the case is called or assigned for argument, unless a different order as to such printing is made by the court, either of its own motion, or upon application made at least ten days before the case is called or assigned for argument; and at least three copies of the printed record shall be furnished to the respective parties, or placed on file for them, at least six days before the argument. The parties may stipulate in writing that only parts of the record shall be printed, of which stipulation the clerk shall have notice before the record shall be printed; and the case may be heard only on the parts so printed, but the court may direct the printing of other parts of the record.

["2. In all cases the plaintiff in error or appellant, on docketing a case or filing the record, shall enter into an undertaking to the clerk, with surety to be approved by the clerk, for the payment of all costs which shall be incurred in the cause.

["3. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and for supervising

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the printing thereof, and shall notify the attorney of the plaintiff in error or the appellant of the amount of his said estimate. If the amount of such estimate shall not be paid to the clerk by said attorney within ten days after such notice, the clerk shall notify the adverse party, or his attorney, if known, and he may pay it within ten days after such notice. If neither party shall pay such cost, and for want of such payment the record shall not have been printed, when the case is reached for hearing the case shall be dismissed.

["4. The clerk shall cause at least twenty-five copies of the record to be printed, and may print a larger number on the request of either party, on payment of the amount necessary for the printing of such extra copies.

["5. The clerk shall supervise the printing, and see that the printed record is properly indexed. He shall distribute the printed copies to the justices of the court from time to time, as required. If the cost of printing the record, together with the clerk's fee for supervising the same, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost and the clerk's fee shall exceed the clerk's estimate, the amount of such excess shall be paid to the clerk before he shall deliver or file the printed record, or any copies thereof.

["6. In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of the printing of the record and of the clerk's fee for supervising the same shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

["7. Upon the clerk's producing satisfactory evidence, by affidavit or acknowledgment of the parties, or the sureties or attorneys, of having served a copy of the bill of fees due from them, respectively, in this court on such parties, their sureties or attorneys, an attachment shall issue against such parties, or their sureties, respectively, to compel the payment of said fees.

["8. The clerk shall adopt a uniform size for the printing of all records, and the same shall be printed in small pica type, on clear white paper, with a margin of not less than an inch and a half, and show by a note or memorandum the time when each pleading or document was filed, and the printed record shall also contain running titles of its contents.

["9. The briefs of attorneys shall also be printed, and conform, as nearly as practicable, to the size of the printed record.

["10. The clerk shall, on or before the conclusion of each case, collect and file, or otherwise preserve together, one copy of the printed record, and of each brief, printed motion, and argument submitted in each case.

["11. In any case where the record shall have been printed in the court below, the presiding judge may, on the application of the plaintiff in error or appellant, order that such printed record, if properly indexed, be used in place of the printing hereinbefore provided for.

["12. The clerk of this court shall advertise for proposals for the printing hereinbefore provided for, which proposals shall be submitted to the senior circuit judge of the court, who shall award such printing to the lowest and best bidder, and all such printing shall be done by the person to whom the same is so awarded. And, when a case shall be heard upon the record printed in the court below, the costs for printing shall be taxed on the basis of such bid for printing, except when the parties otherwise agree.

["13. The fees of the clerk of this court shall be the same as those of the clerk of the supreme court for the same services, which are at present designated by supreme court rule 24."

[This rule was amended May 24, 1893, and its number changed from 35 to 23. For the rule as amended, see rule 23.]

36.

[This additional rule 36, adopted October 8, 1891, was amended by changing its number from 36 to 33.]

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EIGHTH CIRCUIT.

[The rules as originally adopted, where identical with those of the other circuits, will be found at pages cxliii.–clxx. Only such originally adopted rules as were not identical with those of the other circuits, and amendments, changes, and repeals of the rules as originally adopted, are given under this head, reference being made to the others in their proper places.]

1.

[As originally adopted. See page cxliii.]

2.

[As originally adopted. See page cxliii.]

3.

[This rule as originally adopted read as follows: "Terms. One term of this court shall be held annually at the city of St. Louis on the second Monday of October, and shall be adjourned to such times and places as the court may from time to time designate." It was amended June 20, 1892, so as to read as follows:]

TERMS.

One term of this court shall be held annually at the city of St. Louis, Missouri, on the first Monday in December, and one term of this court shall be held annually at the city of St. Paul, Minnesota, on the first Monday of May; and such terms of said court may be adjourned to such times as the court may, from time to time, designate.

4.

[As originally adopted. See page cxliii.]

5.

[As originally adopted. See page cxliv.]

6.

[Amended by the omission of paragraph 1 as originally adopted.]

MARSHAL, CRIER, AND OTHER OFFICERS.

The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

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7.

[The first section of this rule reads as originally adopted. The second section was added by amendment June 27, 1892.]

ATTORNEYS AND COUNSELORS.

1. All attorneys and counselors admitted to practice in the supreme court of the United States, or in any circuit court of the United States, or in the supreme court of any state in this circuit may, upon motion of some member of the bar of this court, be admitted as attorneys and counselors in this court on taking an oath or affirmation in the form prescribed by rule 2 of the supreme court of the United States, and on subscribing the roll; but no fee shall be charged therefor.

2. And any attorney and counselor admitted to practice in the courts of highest original jurisdiction in the states and territories of this circuit, or in the supreme courts of such states and territories, or in the district or circuit courts of the United States for this circuit, will be admitted to practice and enrolled as an attorney and counselor of this court, upon furnishing to the clerk of this court a certificate of a clerk or judge of any one of the courts named that the applicant is an attorney of any one of said courts; and upon subscribing and forwarding to the clerk the following oath: "I do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of the circuit court of appeals for the Eighth circuit, uprightly and according to law; and that I will support the constitution of the United States. So help me God."

8.

[As originally adopted. See page cxlv.]

9.

[As originally adopted. See page cxlv.]

10.

[As originally adopted. See page cxlv.]

11.

[As originally adopted. See page cxlvi.]

12.

[As originally adopted. See page cliii.]

13.

[As originally adopted. See page cliii.]

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14.

[This rule, as originally adopted, was amended February 10, 1896, by adding to the second paragraph the words in brackets.]

WRITS OF ERROR, APPEALS, RETURN, AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.*

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case, [and in cases at law a complete copy of the charge of the court to the jury].

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.†

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safekeeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding sixty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.††

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the supreme court.

15.

[As originally adopted. See page clviii.]

16.***

[As originally adopted. See page clix.]

* See note 12, page clv.

† See note 13, page clvii.

†† Where the citation is made returnable 60 days after its date, and the writ of error on a day named which is less than 60 days therefrom, it will be presumed that the fixing of the latter day was an oversight, and the appeal will not be dismissed where the record is filed thereafter, but within 60 days, though rule 16 requires the record to be filed "by or before the return day." McClellan v. Pyeatt (8th Circuit) 1 C. C. A. 241, 49 Fed. 259.

See, also, note 14, page clviii.

*** A deposit of $25 to secure clerk's costs is required before the record in a cause is filed and docketed.

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17.

[As originally adopted. See page clx.]

18.

[This rule as originally adopted is the same as rule 18, on page clx., except that the word "hereafter" is omitted before the word "awarded."]

19.

[As originally adopted. See page clxi.]

20.

[As originally adopted. See page clxii.]

21.

[As originally adopted. See page clxiii.]

22.

[Amended by the insertion of the words "in error or appellant" in the third line of the first paragraph.]

PARTIES NOT READY.

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff in error or appellant called and the writ of error or appeal dismissed.

2. Where the defendant in error or appellee fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff in error or appellant, and to give judgment according to the right of the case.

3. When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff in error or appellant.

23.

[The rule as originally adopted read as follows: "Printing records. On the filing of the transcript in every case, the clerk shall forthwith cause the same to be printed, and shall furnish three copies of the printed record to each party at least thirty days before the argument.

["The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record.

["The clerk shall be entitled to demand of the appellant or plaintiff in error the cost of printing the record before ordering the same to be done.

["If the record shall not have been printed when the case is reached for argument, for failure of a party to advance the costs of printing, the case may be dismissed.

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["In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given."

[The rule was amended June 20, 1892, so as to read as follows:]

PRINTING RECORDS.

1. The plaintiff in error or appellant may, within 20 days after the allowance of any writ of error or appeal, serve on the adverse party a copy of a statement of the parts of the record which he thinks necessary for the consideration of the errors assigned, and file the same, with proof of service thereof, with the clerk of this court; the adverse party, within 20 days thereafter, may designate in writing and file with the clerk additional parts of the record which he thinks material, and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record in determining the questions raised by the errors assigned. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

2. On the filing of the transcript in every case the clerk shall cause the same, or the parts thereof designated under this rule, to be printed, and shall furnish three copies of the record so printed to each party at least 30 days before the argument.

3. The clerk shall be entitled to demand of the appellant or plaintiff in error the cost of printing the record before ordering the same to be done.

4. If the record shall not have been printed when the case is reached for argument, for failure of the party to advance the costs of printing, the case may be dismissed.

5. In case of reversal, affirmance, or dismissal with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

24.

[This rule as originally adopted reads as follows:]

BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court, at least twenty days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

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2. This brief shall contain, in order here stated:*

(1) A concise abstract or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2) A specification of the errors relied upon,† which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and, in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused.†† When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point.** When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief, at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default he will not be heard, except on consent of his adversary, and by request of the court.

* These provisions, particularly in respect to assignments and specifications of error, and the presentation of the questions to be discussed, will be enforced by the court, to the end that the vital issues in the case may be clearly presented, and immaterial and frivolous matters excluded from consideration. City of Lincoln v. Sun Vapor Street-Light Co. (8th Circuit) 8 C. C. A. 253, 59 Fed. 756.

See, also, note 21, page clxiv.

† See note 22, page clxiv.

†† An assignment of error in giving instructions will not be considered where it fails to comply with this rule, which requires that the part of the charge referred to be set out in totidem verbis. McClellan v. Pyeatt (8th Circuit) 1 C. C. A. 613, 50 Fed. 686.

See, also, note 23, page clxv.

** See note 24, page clxv.

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6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

25.

[As originally adopted. See page clxvi.]

26.

[As originally adopted. See page clxvi.]

27.

[As originally adopted. See page clxvii.]

28.

[As originally adopted. See page clxvii.]

29.

[As originally adopted.* See page clxvii.]

30.

[As originally adopted. See page clxviii.]

31.

[This rule as originally adopted reads as follows. See, also, order of the supreme court establishing a table of fees for the circuit courts of appeals, page clxxi., post.]

COSTS.

1. In all cases where any suit shall be dismissed in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.**

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. When costs are allowed in this court, it shall be the duty of

*See standing order post, page cxxxiii., and note. **See note 27, page clxix.

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the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

6. In all cases certified to the supreme court or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the supreme court.

32.

[As originally adopted. See page clxx.]†

33.

[As originally adopted. See page clxx.]

34.

[As originally adopted. See page clxx.]

[The following order was entered February 8, 1892:]

Ordered, that the clerk issue a mandate or other proper process to the lower court, upon all final judgments of this court, thirty days after the rendition thereof, except in cases where it shall be otherwise expressly ordered.

WRITS OF ERROR IN CRIMINAL CASES.

1. Writs of error to review criminal cases tried in any district or circuit court of the United States within this circuit, which may be reviewed under the provisions of the act of March 3, 1891, creating this court, and the act of congress amendatory thereof, approved January 20, 1897—may be allowed in term time or in vacation by the circuit justice assigned to this circuit, or by either of the circuit judges within the circuit, or by any district judge within his district, and the proper security be taken, and the citation signed by him, and he may also grant a supersedeas and stay of execution or proceedings, pending the determination of such writ of error.

2. Where such writ of error is allowed in the criminal cases aforesaid, the circuit court or district court before which the accused was tried, or the district judge of the district wherein he was tried, within the district, or the circuit justice assigned to the circuit, or either of the circuit judges within the circuit, shall have the power, after the citation has been duly served, to admit the accused to bail in such amount as may be fixed, such bail bond to be, as near as may be, in the form prescribed in the appendix to these rules.

Promulgated February 23, 1897.

† But see orders of February 8, 1892, and February 20, 1893, pages cxxx., cxxxiii.

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APPENDIX TO RULE 35.††

[Form of Appearance Bond on Writ of Error in Criminal Cases.]

Know All Men by These Presents,

That we, —— as principal, and —— as sureties, are held and firmly bound unto the United States of America in the full and just sum of —— Dollars, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this —— day of —— in the year of our Lord, One Thousand Eight Hundred and Ninety- ——.

Whereas, lately at the —— Term, A. D. 189—, of the —— Court of the United States for the —— District of ——, in a suit depending in said Court between the United States of America, plaintiff, and ——, defendant—, a judgment and sentence was rendered against the said —— and the said —— ha— obtained a writ of error from the United States Circuit Court of Appeals for the Eighth Circuit, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation, which citation has been duly served.

Now the condition of the above obligation is such that if the said —— shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Eighth Circuit on such day or days as may be appointed for the hearing of said cause in said Court and prosecute his said writ of error and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Eighth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the —— Court of the United States for the —— District of —— on such day or days as may be appointed for a retrial by said —— Court, and abide by and obey all orders made by said Court provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Eighth Circuit; then the above obligation to be void, otherwise to remain in full force, virtue and effect.

———— [Seal.]
———— [Seal.]
———— [Seal.]

Approved:—

———————
Judge of the ——.

[Form of Writ of Error for Use in the United States Circuit Court of Appeals, Eighth Circuit.]

United States of America, ss.:

The President of the United States of America, to the Honorable Judges of the (1) ——, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said —— court, before you, at the —— term, 18—, thereof, between (2) ——, a manifest error hath happened, to the great damage of the said (3) ——, as by —— complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for

††For appendix to rule 35, as originally adopted in the Eighth circuit, see 22 C. C. A. vi., 78 Fed. cxxxi.

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the Eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals, for the Eighth circuit, on or before the (4) —— day of ——, 18—, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, chief justice of the supreme court of the United States, this —— day of ——, in the year of our Lord one thousand eight hundred and ——.

Issued at office in ——, with the seal of the (5) ——, and dated as aforesaid.

——————,
Clerk of ——.

Allowed by

——————,
—— Judge.

[Form of Return to be Endorsed on Writ of Error by the Clerk of the Court to Which the Writ is Addressed.]

United States of America, ss.:

——————.

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of (6) ——.

——————,
Clerk of ——.

NOTES.—(1) Here insert correct name of the court to which the writ is addressed and whose judgment is to be reviewed.

(2) Here insert correct style of cause, showing who was plaintiff and who defendant in court below.

(3) Here insert name of party who sues out writ of error.

(4) Rule 14, subdivision 5, requires writs of error and appeals to be made returnable sixty days after citation is signed.

This blank must be filled accordingly, naming a day not more than sixty days after the date of the citation.

(5) See section 1004, Rev. St., and section 11, Act March 3, 1891. This blank should be so filled as to show whether the writ is issued by the clerk of a United States circuit court or by the clerk of the circuit court of appeals.

(6) Here describe the court to which the writ is addressed.

[Form of Citation.]

United States of America, to ——————, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the Eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to (1) —— filed in the clerk's office of the (2) ——, wherein —— is (3) ——, and you are (4) ——, to show cause, if any there be, why the (5) —— rendered against the said (6) —— as in said (7) —— mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable (8) ——————, judge of —— this —— day of ——, A. D. 18—.

——————,
Judge of ——.

NOTES.—(1) Insert (a writ of error) or (an appeal allowed and).

(2) Insert name of court to which writ of error is addressed, or from which appeal is allowed.

(3) Insert plaintiff in error or appellant.

(4) Insert defendant in error or appellee.

(5) Insert judgment or decree.

(6) Insert plaintiff in error or appellant.

(7) Insert writ of error or appeal.

(8) As to who may sign citation, see sections 998 and 999, Rev. St. U. S., and section 11, Act March 3, 1891, establishing circuit courts of appeals.

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[Form of Supersedeas or Cost Bond.]

Know all men by these presents,

That we, ———, are held and firmly bound unto ——— in the full and just sum of ———, to be paid to the said ———, heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals, and dated this ——— day of ———, in the year of our Lord one thousand eight hundred and ———.

Whereas, lately at the ——— term of the ———, in a suit depending in said court between ———, plaintiff, and ———, defendant, ——— was rendered against the said ———, and the said ——— has obtained ——— of the said court to reverse the ——— in the aforesaid suit, and a citation directed to the said ———, citing and admonishing ——— to be and appear in the United States circuit court of appeals for the Eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said ——— shall prosecute said ——— to effect, and answer all damages and costs if ——— fail to make good ——— plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of ——— [Seal.]
——— [Seal.]
——— [Seal.]

Approved by
———

The foregoing bond and citation is adapted for appeals in equity cases as well as in cases of writs of error in actions at law.

[The following order was entered February 20, 1893:]

It is now ordered by this court that the order in relation to the issuance of mandates in cases finally disposed of, entered on the eighth day of February, 1892, be, and the same is hereby vacated and set aside.

It is further ordered that the clerk of this court issue a mandate or other proper process to the lower court, in all cases finally disposed of in this court, sixty days after the final disposition thereof, except in cases dismissed under the provisions of rule twenty and section one of rule sixteen of this court, and except in cases where it shall be otherwise expressly ordered.*

* A motion for rehearing should be filed before the expiration of this 60 days unless counsel were not notified of the decision, or could not, with reasonable diligence, have ascertained the facts on which the motion is based, within that time. Crabtree v. McCurtain (8th Circuit) 13 C. C. A. 275, 66 Fed. 1.

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NINTH CIRCUIT.

[The rules as originally adopted, where identical with those of the other circuits, will be found at pages cxliii.-clxx. Only such originally adopted rules as were not identical with those of the other circuits, and amendments, changes, and repeals of the rules as originally adopted, are given under this head, reference being made to the others in their proper places.]

1.

[As originally adopted. See page cxliii.]

2.

[As originally adopted. See page cxliii.]

3.

[This rule as originally adopted reads as follows:]

TERMS.

One term of this court shall be held annually at the city of San Francisco on the first Monday of October, and shall be adjourned to such times and places as the court may from time to time designate.

4.

QUORUM.

1. If at any term or session a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding, or process, depending in or returned to the court, preparatory to hearing, trial, or decision thereof.

5.

CLERK.

1. The clerk's office shall be kept at San Francisco, California.

2. The clerk shall not practice, either as attorney or counsellor in this court or in any other court while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by section 794 of the Revised Statutes, and shall give bond in a sum to be fixed, and with sureties to be approved, by the court, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments, and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe keeping as the court may direct.

4. He shall not permit any original record or paper to be taken from the court-room or from the office, without an order from the court, except as provided in Rule 23.

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6.

MARSHAL, CRIER AND OTHER OFFICERS.

1. The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

7.

[This rule as originally adopted reads as follows:]

ATTORNEYS AND COUNSELLORS.

All attorneys admitted to practice in the supreme court of the United States, or in any circuit court of the Ninth circuit, shall be deemed attorneys of the circuit court of appeals for the Ninth circuit; but such attorneys, on or before their first appearance in open court, shall take an oath or affirmation, in the form prescribed by rule 2 of the supreme court of the United States, and subscribe the roll of attorneys. All other persons who have been admitted to practice in the highest court of any state or territory, upon presenting satisfactory evidence of good moral character and fair professional standing, may be admitted to practice in said court, upon taking the oath so prescribed, and subscribing the roll of attorneys.

8.

[As originally adopted. See page cxlv.]

9.

[As originally adopted. See page cxlv.]

10.

[As originally adopted. See page cxlv.]

11.

[As originally adopted. See page cxlvi.]

12.

[As originally adopted. See page cliii.]

13.

[As originally adopted.] See page cliii.]

14.

WRITS OF ERROR, APPEALS, RETURN AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, opinion or opinions of the court, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

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2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record the original writ of error and citation, or citation issued in the cause, and a certificate under seal stating the cost of the record and by whom paid.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in General Admiralty Rule No. 52 of the Supreme Court.

15.

[As originally adopted. See page clviii.]

16.

[As originally adopted. See page clix.]

17.

DOCKET.*

The clerk shall, upon payment to him by the appellant or plaintiff in error of a deposit of twenty-five dollars in each case, enter upon a docket all cases brought to and pending in the court in their proper chronological order.

18.

[As originally adopted. See page clx.]

19.

[As originally adopted. See page clxi.]

20.

[As originally adopted. See page clxii.]

21.

MOTIONS.

1. All motions to the court shall be reduced to writing, shall contain a brief statement of the facts and objects of the motion and shall be served upon opposing counsel at least five days before the day noticed for the hearing.

*See additional rule 35, post, page cxii.

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2. One-half hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice as above has been given to the adverse party, or the counsel or attorney of such party.

22.

PARTIES NOT READY.

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called, and the writ of error or appeal dismissed.

2. When the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

3. Where a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff in error or appellant.

23.

PRINTING RECORDS.

1. Hereafter all records shall be printed under the supervision of the clerk, and upon the docketing of a cause, he shall cause an estimate to be made of the expense of printing the record, and his fee for preparing it for the printer and supervising the printing, and shall notify the party docketing the case of the amount of the estimate. If the amount so estimated is not promptly paid over to the clerk and for want of such payment the record shall not have been printed when a case is reached for argument, the case shall be dismissed.

2. Upon payment of the amount estimated by the clerk, thirty copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

3. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers sent up under Rule 14, section 4, as are necessary to be printed; and the whole of the record in cases of original jurisdiction.

4. The clerk shall supervise the printing and see that the printed copy is properly indexed. He shall distribute the printed copies to the judges and the reporter, and one or more printed copies to the counsel for the respective parties.

5. If the expense of printing and supervision shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying same. If the expense is greater than the estimate the amount of such excess shall be paid to the clerk before he shall file the printed record or deliver copies to the parties or their counsel.

6. In case of reversal, affirmance or dismissal, with costs, the amount paid for printing the record and of the clerk's fee shall be taxed against the party against whom costs are given.

7. The plaintiff in error or appellant may, upon filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party within ten days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, or if such parts be distinctly designated by stipulation of counsel for the respective parties, the clerk shall print those parts only; and the court will con-

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sider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

All statements and stipulations filed hereunder shall distinctly and accurately refer to the pages of the original certified record, as well as the documents to be printed or omitted.

8. At the time of filing the record and docketing the cause, counsel for the plaintiff in error or appellant in patent cases may furnish the clerk with copies of patent office drawings and specifications to be used as inserts, and the same, if in proper form and of convenient size, shall be used in printing the record without cost to the parties.

9. The fee of the clerk for preparing the record for the printer, indexing the same, supervising the printing, and distributing the copies, for each printed page of the record and index, twenty-five cents.*

24.

BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court, twenty copies of a printed brief, and serve upon counsel for the defendant in error or the appellee one copy thereof, at least ten days before the case is called for argument.

2. The brief shall contain, in order here stated:***

(a) A concise abstract or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(b) A specification of the errors relied upon,† which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused.** When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(c) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point.†† When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief and serve upon counsel for plaintiff in error or appellant one copy thereof, at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of error shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in

* See order of the supreme court establishing a table of fees for the circuit courts of appeals, page clxxi., post.

*** See note 21, page clxiv.

** See note 23, page clxv.

† See note 22, page clxiv.

†† See note 24, page clxv.

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default, the case may be dismissed on motion; and, when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but, if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

25.

ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. One hour on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion: provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

26.

FORM OF PRINTED RECORDS, ARGUMENTS, BRIEFS AND PETITIONS FOR RE-HEARING.

1. All records printed for the use of the court must be printed on unruled white writing paper, nine and one-quarter inches long and six and one-quarter inches wide. The printed page exclusive of any marginal note, reference or running head, must be seven inches long and four inches wide, excepting in patent cases where counsel furnish to the clerk at the time of docketing the cause patent office drawings and specifications for insertion. In such cases the margin of the record may be sufficiently enlarged to accommodate such drawings and specifications. The record must be properly indexed. Pica double-leaded is the only mode of composition allowed.

2. All arguments, briefs, and petitions for re-hearing, printed for the use of the court, must be printed on unruled white writing paper, nine and one-quarter inches long and six and one-quarter inches wide. The printed page, exclusive of any marginal note, reference or running head, must be seven inches long and four inches wide. Pica double-leaded is the only mode of composition allowed.

27.

[As originally adopted. See page clxvii.]

28.

[As originally adopted. See page clxvii.]

29.

REHEARING.

A petition for rehearing may be presented within 15 days after judgment. It must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel that in his judgment it is well founded, and that it is not interposed for delay. Twenty printed copies must be filed with the clerk of this court.

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30.

[As originally adopted. See page clxviii.]

31.

COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, including the cost of the transcript from the court below, unless otherwise ordered by the court.

4. Neither of the foregoing sections shall apply to cases where the United States are a party, but in such cases no costs shall be allowed in this court for or against the United States.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

6. In all cases certified to the supreme court or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the supreme court.

7. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of any bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties respectively to compel payment of said fees.*

32.

MANDATE.

In all cases finally determined in this court, a mandate or other proper process in the nature of a procedendo, at the request of counsel for the prevailing party and upon the payment of any costs due in the case, shall be issued, as of course from this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain. Such mandate, if not stayed by the order of the court, shall be issued on the expiration of fifteen days from the date of such final determination unless within said time a petition for rehearing be filed, in which case the mandate shall not issue until after the determination of such petition.

33.

[As originally adopted. See page clxx.]

34.

[As originally adopted. See page clxx.]

*See order of the supreme court establishing a table of fees for the circuit courts of appeals, page clxxi., post.

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35.

ASSIGNMENT OF CAUSES FOR HEARING.

1. Thirty days prior to the opening of any calendar session of the court, the clerk is directed to assign causes for hearing at the rate of one case for each Monday, and two cases per day for the following four days of each week. Causes shall be grouped by states, and assignments made, so as to permit the hearing of causes from one state before the causes from the next state in order shall be called; causes from the Northern district of California shall be assigned for hearing last. Any causes entitled by law to preference in hearing shall be first assigned and take precedence over other causes from the same state.

2. A stipulation to continue a case to the foot of the calendar or in any way change the day assigned for hearing, will not be recognized as binding upon the court, and no such change will be made except by order of the court for reason shown.

3. Ten days before each calendar session of the court the clerk shall prepare and cause to be printed a calendar of the causes assigned for the approaching session.

36.

TERMS AND SESSIONS OF THE COURT.

1. One term of this court shall be held annually on the first Monday of October and adjourned sessions on the first Monday of each month in the year. All sessions shall be held at San Francisco unless otherwise especially ordered by the court.

2. The October, February and May sessions shall be known as calendar sessions, and shall be sessions for the trial of all causes that shall have been placed upon the calendar in pursuance of Rule 35.

3. A term of this court shall be held annually in the city of Seattle in the state of Washington and in the city of Portland in the state of Oregon. The Seattle term shall be held beginning upon the second Monday in September and the term at Portland shall be held beginning upon the third Monday in September. All appeals and writs of error from the circuit and district courts for the district of Washington shall be heard at said annual term in the city of Seattle, unless it is stipulated by the parties thereto that they be heard at San Francisco. All appeals and writs of error from the circuit and district courts for the district of Oregon shall be heard at said annual term in the city of Portland, unless it is stipulated by the parties thereto that they be heard at San Francisco. Appeals and writs of error from the circuit and district courts for the districts of Idaho and Montana may, upon the stipulation of the parties thereto, be heard at the annual term to be held either at Seattle or Portland.

37.

CERTIFICATION OF PRINTED MATTER.

In all cases where printed matter is certified, the fees of the clerk of this court for certifying to such printed matter are hereby fixed at the rate of twenty cents per folio of one hundred words.

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ORIGINAL RULES.

[The rules of the circuit courts of appeals as originally adopted were substantially the same in the different circuits, and are here printed in full. Where the rule as originally adopted differed from the rule as here given, it will be found printed in full under its respective circuit; and all amendments, repeals, and additions are likewise shown under the head of the respective circuits.]

1.

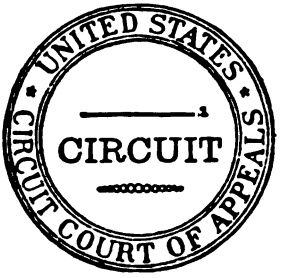
NAME.

The court adopts "United States Circuit Court of Appeals for the ———[1] Circuit" as the title of the court.

2.

SEAL.

The seal shall contain the words "United States" on the upper part of the outer edge; and the words "Circuit Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "———[1] Circuit" in two lines, in the center, with a dash beneath.



3.

TERMS.

[See this rule under the head of the particular circuit.]

4.

QUORUM.

1. If at any term a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court

[1] [First, second, third, fourth, fifth, sixth, seventh, eighth, and ninth, respectively.]

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from time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding, or process, depending in or returned to the court, preparatory to hearing, trial, or decision thereof.

5.

CLERK.

1. The clerk's office shall be kept at the place designated in the act creating the court at which a term shall be held annually.

2. The clerk shall not practice, either as attorney or counselor, in this court, or in any other court, while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by section 794 of the Revised Statutes, and shall give bond in a sum to be fixed, and with sureties to be approved, by the court, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe-keeping as the court may direct.

4. He shall not permit any original record or paper to be taken from the court-room or from the office without an order from the court.

6.

MARSHAL, CRIER, AND OTHER OFFICERS.

1. Every marshal and deputy-marshal shall, before he enters on the duties of his appointment, take an oath in the form prescribed by section 782 of the Revised Statutes, and the marshal shall, before he enters on the duties of his office, give bond in a sum to be fixed, and with sureties to be approved, by the court, for the faithful performance of said duties by himself and his deputies. Said bond shall be filed and recorded in the office of the clerk of the court.

2. The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

7.

ATTORNEYS AND COUNSELORS.

All attorneys and counselors admitted to practice in the supreme court of the United States, or in any circuit court of the United States, shall become attorneys and counselors in this court on taking an oath or affirmation in the form prescribed bv rule 2 of the su-

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preme court of the United States, and on subscribing the roll; but no fee shall be charged therefor.

8.

PRACTICE.

The practice shall be the same as in the supreme court of the United States, as far as the same shall be applicable.[2]

9.

PROCESS.

All process of this court shall be in the name of the president of the United States, and shall be in like form and tested in the same manner as process of the supreme court.

10.

BILL OF EXCEPTIONS.

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions, and allowed by the court.[3]

[2] Under this rule, rule 90 of the supreme court, which provides that, in the absence of an express rule or decision, the practice in equity shall be regulated by the practice of the high court of chancery in England, so far as the same may be reasonably applied, not as positive rules, but as furnishing just analogies, is adopted. Richmond v. Atwood (1st Circuit) 2 C. C. A. 610, 52 Fed. 10.

It was held in the Fifth circuit in The Beeche Dene, 5 C. C. A. 208, 55 Fed. 526, that under this rule the practice in admiralty appeals is not like that formerly existing in the circuit courts under admiralty rule 49, but like the supreme court practice; and new evidence cannot be taken by deposition de bene esse, but only by a commission under supreme court rule 12, which should not issue of course, but only when it appears that the testimony is material, and a good excuse for not offering it in the trial court is given. But in the earlier case of The Havilah (2d Circuit) 1 C. C. A. 77, 48 Fed. 684, and in the later case of The Philadelphian (1st Circuit) 9 C. C. A. 54, 60 Fed. 423, in which this rule was not referred to, it was held that new evidence could be taken by deposition de bene esse; and at the time of deciding the later case the court promulgated new rules covering the introduction of new evidence in admiralty appeals, as amendments to rule 14. See rule 14 in the First circuit, rule 35 in the Sixth circuit, and "Rules in Admiralty," in the Second circuit. See, also, note 32, under the eleventh section of the act establishing the courts of appeals, page xxxvii., supra.

[3] A general exception to the whole charge is unavailing where there is more than one point of law involved therein. Association v. Rutherford (2d Circuit) 2 C. C. A. 355, 51 Fed. 513; Thom v. Pittard (4th Circuit) 10 C. C. A. 352, 62 Fed. 232; Price v. Pankhurst (8th Circuit) 3 C. C. A. 551, 53 Fed. 312; Association v. Lyman (7th Circuit) 9 C. C. A. 104, 60 Fed. 498.

An exception to a portion of a charge to a jury containing several proposi-

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11.

ASSIGNMENT OF ERRORS.

The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal,* an

tions, some of which are favorable to the exceptant, is not available to raise the question of error in such charge. Pickham v. Manufacturing Co. (7th Circuit) 77 Fed. 663, 23 C. C. A. 391.

An exception to the judge's "charge in its entirety, and to the following portions thereof," followed by a series of propositions embracing substantially all of the charge, is not good where any part of the charge is correct. Vider v. O'Brien (7th Circuit) 10 C. C. A. 385, 62 Fed. 326.

A general exception to a long paragraph of a charge containing numerous statements of fact will not raise the point that a particular statement was erroneous. Philip Schneider Brewing Co. v. American Ice-Mach. Co. (8th Circuit) 77 Fed. 138, 23 C. C. A. 89.

Exceptions which refer to the charge of the court as a whole instead of pointing out only the several matters of law excepted to are insufficient, and the defect cannot be remedied in the assignments of error. Newman v. Iron Co. (4th Circuit) 80 Fed. 228, 25 C. C. A. 382.

An exception "to so much of" a long and elaborate charge "as requires the evidence should show there was an intention to deceive" is too general for consideration. Assurance Co. v. Lucker (4th Circuit) 77 Fed. 243, 23 C. C. A. 139.

Where only a general exception is taken to the refusal of a series of instructions, it will not be considered, if any one of the propositions is unsound or inapplicable. Transfer Co. v. Morris (7th Circuit) 30 C. C. A. 575, 87 Fed. 127; New England Furniture & Carpet Co. v. Catholicon Co. (8th Circuit) 24 C. C. A. 595, 79 Fed. 294; Waples-Platter Co. v. Turner (8th Circuit) 27 C. C. A. 439, 83 Fed. 64.

A bill of exceptions relating to the refusal of instructions must show affirmatively the errors alleged, that they were prejudicial, and that timely objections were made thereto, and the grounds clearly stated; otherwise it is fatally defective. Newman v. Iron Co. (4th Circuit) 80 Fed. 228, 25 C. C. A. 382.

A mere general exception to the failure of the court to give nine separate propositions, requested before the argument and charge, and not afterwards called to the attention of the court, is too vague to require any action by an appellate court. Railway Co. v. Thompson (6th Circuit) 82 Fed. 720, 27 C. C. A. 333.

Exception to the overruling of a motion by chattel mortgagees for a peremptory instruction in their favor, on the ground that plaintiff in attachment has failed to show any title to or lien upon the mortgaged property, does not raise the question of the sufficiency of the evidence to justify submitting to the jury the question as to whether mortgagees had participated in alleged fraud of the mortgagor in the execution of the mortgage. Swofford Bros. Dry-Goods Co. v. Smith-McCord Dry-Goods Co. (8th Circuit) 85 Fed. 417, 29 C. C. A. 239.

A charge to the jury does not become a part of the record unless incorporated in the bill of exceptions, and, if not so incorporated, can only be con-

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* The petition for a writ of error is intended merely to ask for a writ of error in general terms, and need not specifically mention each order or judgment complained of; but it is enough if such orders and judgments are excepted to, and assigned for error in the assignments of error. Tefft v. Stern (6th Circuit) 21 C. C. A. 73, 74 Fed. 755.

After defendant in error has argued, both orally and in his brief, errors assigned in respect to an order amending the judgment originally entered, it is then too late to set up an alleged defect in the petition for a writ of error, in that it did not specifically mention such amending order or judgment. Tefft v. Stern (6th Circuit) 21 C. C. A. 73, 74 Fed. 755.

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assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged.[4] No writ of error or

sidered by the appellate court as the opinion of the judge below, the same as any other opinion required by rule 14 to be transmitted with the record. Blake v. U. S. (1st Circuit) 18 C. C. A. 117, 71 Fed. 286.

No advantage can be taken in an appellate court of alleged errors in the charge of the court below, where no exception has been taken. Transfer Co. v. Morris (7th Circuit) 30 C. C. A. 575, 87 Fed. 127.

On appeal from the court of appeals, the supreme court will not review a portion of a charge to which no exception was taken, and which was not assigned for error in the circuit court of appeals. Eddy v. Lafayette, 16 Sup. Ct. 1082, 163 U. S. 456.

The circuit court of appeals cannot review instructions given or refused in the presence of counsel, when the record shows that no exceptions were taken until after the jury retired. But if, after retiring, the jury return for instructions, which are given in the absence of counsel, it will be sufficient if exceptions are taken as soon as opportunity is offered. Bank v. McGraw (9th Circuit) 76 Fed. 930, 22 C. C. A. 622.

[4] The object of this rule and rule 24 is to so present the matter raised by the assignment of error that the court may understand what is the question it is called upon to decide, without going beyond the assignment itself, and also that the party excepting may be confined to the objection taken at the time, which must then have been stated specifically. Van Gunden v. Iron Co. (4th Circuit) 3 C. C. A. 294, 52 Fed. 838.

Under this rule, an assignment of error cannot be good if it is necessary to look beyond its terms to the brief for a specific statement of the question to be presented. Grape Creek Coal Co. v. Farmers' Loan & Trust Co. (7th Circuit) 12 C. C. A. 350, 63 Fed. 891.

To obtain the benefit of any error in respect to the action of the court in failing to give effect to a particular statute, there should be some specific assignment, definitely pointing out the action complained of. City of Findlay v. Pertz (6th Circuit) 20 C. C. A. 662, 74 Fed. 681.

The specifications of error on appeal should be, not that the evidence shows this or that, but that in this or that particular, separately stated, the decree is erroneous. Andrews v. Pipe Works (7th Circuit) 22 C. C. A. 110, 76 Fed. 166.

An assignment of errors made up by basing a separate assignment upon every exception taken during the trial, where exception was taken to every ruling of the judge, is equivalent to a general assignment of errors. Railroad Co. v. Bucki (5th Circuit) 16 C. C. A. 42, 68 Fed. 864.

Assignments of error should be directed to the ruling of the court, and, where the decree appealed from is one confirming a master's report, the assignments should not be in the form of elaborate arguments in support of the contention that the court erred in sustaining the master's findings. Randolph v. Allen (5th Circuit) 19 C. C. A. 353, 73 Fed. 23.

Assignments which merely allege error in making certain decrees without more particularly pointing out in what the error consisted, are not in accordance with the rule, and will be stricken from the record on motion. Railroad Co. v. Cutting (5th Circuit) 15 C. C. A. 597, 68 Fed. 586.

An assignment of error based upon a general exception to a ruling refusing to permit the cause to go to the jury on the questions of fact involved, without specifying any particular question of fact to be submitted, is not valid. Guggenheim v. Kirchhofer (2d Circuit) 14 C. C. A. 72, 66 Fed. 755.

Assignments of error are required by the rules to point out the specific ground of error relied on, and an assignment that the court erred in charging the jury that there was no evidence establishing a defense is too general. Hart v. Bowen (5th Circuit) 31 C. C. A. 31, 86 Fed. 877.

An assignment stating that "there is error in said decree in this: that said court, upon the whole evidence, should have rendered a decree in favor of the complainant,"—is too general, and cannot be aided by an attempt to make it

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appeal shall be allowed until such assignment of errors shall have been filed.[5] When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full

more particular in the brief. Doe v. Mining Co. (9th Circuit) 17 C. C. A. 190, 70 Fed. 455.

An assignment merely stating that the court erred in admitting and rejecting testimony, that the verdict is contrary to law, and not supported by the evidence, and that the court erred in instructing the jury to find a verdict for plaintiff, and in rendering judgment for plaintiff, brings nothing to the attention of the appellate court. Oswego Tp. v. Travelers' Ins. Co. (8th Circuit) 17 C. C. A. 77, 70 Fed. 225.

Assignments that the court erred in directing a verdict for plaintiff, and in refusing to instruct that if the jury believed the evidence they must find for defendant, amount merely to a statement that the court erred in deciding the case, and are not in compliance with rule 11. Lodge v. Withers (5th Circuit) 32 C. C. A. 182, 89 Fed. 160.

An assignment that the court erred in allowing certain claims, which the evidence adduced by libelant did not substantiate, is too general to be considered. The Natchez (5th Circuit) 78 Fed. 183, 24 C. C. A. 49; New Orleans Nav. Co. v. St. Louis & N. O. Anchor Line, Id.

General assignments that the court erred in rendering judgment against the defendant, and in not rendering judgment in his favor, cannot be considered. U. S. v. Ferguson (2d Circuit) 78 Fed. 108, 24 C. C. A. 1; Hart v. Bowen (5th Circuit) 86 Fed. 877, 31 C. C. A. 31.

Assignments of error that in substance amount to only that the court erred in deciding the case for the opposite party are not specific enough to demand consideration. Louisiana, A. & M. R. Co. v. Board of Levee Com'rs of Tensas Basin Levee Dist. (5th Circuit) 31 C. C. A. 121, 87 Fed. 594.

It is unnecessary and cumbersome to give, in an assignment of error, the reasons why the ruling complained of is claimed to be erroneous, or to state the fact that the party duly objected and excepted to such ruling, and to fur-

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[5] The court will not review the judgment where the assignment of errors was not filed until after the writ of error was allowed, nor until after the expiration of the six months allowed for suing out the writ of error. Union Pac. Ry. Co. v. Colorado Eastern Ry. Co. (8th Circuit) 4 C. C. A. 161, 54 Fed. 22; U. S. v. Goodrich (8th Circuit) 4 C. C. A. 160, 54 Fed. 21; Flahrity v. Railway Co. (8th Circuit) 6 C. C. A. 167, 56 Fed. 908; Crabtree v. McCurtain (8th Circuit) 10 C. C. A. 86, 61 Fed. 808.

Assignments of error not filed in the trial court by plaintiff in error or appellant at the time he files his petition for writ of error or appeal will not be considered on appeal, though the trial court, at the time such petition is filed and the writ or appeal is allowed, grants additional time for filing assignments of error, and they are filed within the time granted. Insurance Co. v. Conoley (4th Circuit) 11 C. C. A. 116, 63 Fed. 180.

This rule is applicable to all cases of appeals in equity as well as in admiralty, and to writs of error; and a failure to file such assignment is good ground for dismissing the appeal. Dufour v. Lang (5th Circuit) 4 C. C. A. 663, 54 Fed. 913.

Where plaintiff in error incorporates the errors complained of into the petition for appeal, and the petition is then filed with the clerk, the assignment of errors is "filed with his petition," as required by rule 11. Central Trust Co. v. Continental Trust Co. of City of New York (8th Circuit) 30 C. C. A. 235, 86 Fed. 517.

It is no ground of objection that an appeal is expressly limited to a part of the decree below, when this is the only part from which the appellant could appeal, especially in view of the fact that under rule 11, which requires an assignment of errors to be filed simultaneously with the appeal, the legal effect may be in any case a partial appeal. Nashua & L. R. Corp. v. Boston & L. R. Corp. (1st Circuit) 9 C. C. A. 468, 61 Fed. 237.

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substance of the evidence admitted or rejected.[6] When the error alleged is to the charge of the court, the assignment of error shall set out the part referred to totidem verbis, whether it be in instruc-

ther give the grounds of objection. Railroad Co. v. Meyers (7th Circuit) 76 Fed. 443, 22 C. C. A. 268.

Where counsel in their briefs have discussed a question as to the effect of amending the specifications of a patent in the patent office, under a general assignment that the court erred in holding the patent valid, without raising any objection as to the sufficiency of the assignment, they cannot afterwards insist, on motion for rehearing, that the assignment was not sufficiently specific. Michigan Cent. R. Co. v. Consolidated Car-Heating Co. (6th Circuit) 16 C. C. A. 106, 69 Fed. 1.

There should be a separate assignment of error in respect to each part of the charge which is alleged to be erroneous. Vider v. O'Brien (7th Circuit) 10 C. C. A. 385, 62 Fed. 326.

A specification of error directed to a portion of a charge to a jury containing several propositions, some of which are favorable to the exceptant, is not available to raise the question of error in such charge. Pickham v. Manufacturing Co. (7th Circuit) 77 Fed. 663, 23 C. C. A. 391.

An assignment alleged that the court erred "in refusing to instruct the jury as requested by said defendant, a copy of which instructions, so requested and refused, with the ruling of the court, and exceptions of the defendant thereto, is hereto annexed, and marked 'Exhibit A.'" Then followed seven different instructions, separately stated, properly numbered, and in numerical order. *Held*, that this was not a compliance with the rule requiring each error to be separately stated. Sutherland v. Brace (7th Circuit) 18 C. C. A. 199, 71 Fed. 469.

Assignments of errors "in excluding legal and proper evidence offered by" plaintiff, and "in admitting illegal and improper evidence offered by" defendant, are insufficient. National Bank of Commerce v. First Nat. Bank (8th Circuit) 10 C. C. A. 87, 61 Fed. 809.

Where three defendants, who are jointly indicted, but separately sentenced to different punishments, join in a writ of error, and assign as error that "the

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[6] Alleged errors in the admission and exclusion of evidence will not be considered unless the testimony alleged to have been erroneously admitted or excluded is set out substantially in the assignment of errors, as required by rule 11. Haldane v. U. S. (8th Circuit) 16 C. C. A. 447, 69 Fed. 819; American Nat. Bank v. National Wall-Paper Co. (8th Circuit) 23 C. C. A. 33, 77 Fed. 85; Newman v. Iron Co. (4th Circuit) 25 C. C. A. 382, 80 Fed. 228; Schradsky v. Stimson (8th Circuit) 22 C. C. A. 515, 76 Fed. 730; Safe-Deposit Co. v. Allen (8th Circuit) 27 C. C. A. 87, 82 Fed. 148. See, also, note to Ladd v. Mining Co. (8th Circuit) 14 C. C. A. 248.

Assignments of error "in excluding legal and proper evidence offered by" plaintiff, and "in admitting illegal and improper evidence offered by" defendant, are insufficient, under rule 11, requiring an assignment of errors, when error is alleged in admission or rejection of evidence, to "quote the full substance of the evidence admitted or rejected." National Bank of Commerce of Kansas City, Mo., v. First Nat. Bank of Kansas City, Kan. (8th Circuit) 10 C. C. A. 87, 61 Fed. 809.

Assignments that "the court erred in permitting evidence as shown in bills of exceptions numbers two and three," which errors can be ascertained only by a careful reading of a voluminous record, will not be considered. Gallot v. U. S. (5th Circuit) 31 C. C. A. 44, 87 Fed. 446.

An assignment that the court erred in admitting in evidence a certain paper "as set forth in bill of exceptions" is not good because it does not contain a statement of the full substance of the document referred to. Distilling Co. v. Rheinstrom (7th Circuit) 30 C. C. A. 10, 86 Fed. 244.

Where a witness is not permitted to answer a question, the full substance of the expected answer should be set out in the assignment of error. U. S. v. Indian Grave Drainage Dist. (7th Circuit) 85 Fed. 928, 29 C. C. A. 578.

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tions given or in instructions refused.[7] Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done, counsel will not be heard, except at the

court erred in the sentence which it passed upon the defendants," the assignment is too indefinite to present any question. MacDonald v. U. S. (7th Circuit) 12 C. C. A. 339, 63 Fed. 426.

Where a demurrer based on several different grounds is overruled, a mere general assignment that the court erred in overruling the demurrer, without specifying any particular ground of demurrer as wrongly ruled, is not sufficiently specific. City of Anniston v. Safe-Deposit & Trust Co. (5th Circuit) 85 Fed. 856, 29 C. C. A. 457.

Where the proposition asserted in an assignment of error in a patent case is that the claims of two or more patents involved in the suit were valid, or that various claims of the two patents were infringed, such assignment must, in strictness, be overruled, if any one of the claims mentioned is valid, or if any one of them is infringed. Standard Elevator Co. v. Crane Elevator Co. (7th Circuit) 76 Fed. 767, 22 C. C. A. 549.

Upon an appeal from a decree which simply dismissed a bill for infringement of a patent, the assignment of error read that the court erred "in holding that respondents had not infringed upon the patent in suit, and it erred in declining to grant a provisional injunction, with reference for accounting in damages and profits." *Held*, that the assignment was contrary to rule 11, in that it embraced two distinct propositions. Clark v. Deere & Mansur Co. (7th Circuit) 80 Fed. 534, 25 C. C. A. 619.

On error to a circuit court from a ruling directing a verdict for the defendant, the assignment of errors should contain a separate specification for each count of the declaration upon which the right to go to the jury is asserted. Russell v. Manufacturing Co. (7th Circuit) 83 Fed. 976, 28 C. C. A. 243.

Every separate exception intended to be urged as error should be made the subject of a distinct specification in the assignment of errors, and no specification should embrace more than one exception. U. S. v. Indian Grave Drainage Dist. (7th Circuit) 85 Fed. 928, 29 C. C. A. 578.

Exceptions which refer to the charge of the court as a whole instead of pointing out only the several matters of law excepted to are insufficient, and the defect cannot be remedied in the assignments of error. Newman v. Iron Co. (4th Circuit) 80 Fed. 228, 25 C. C. A. 382.

On appeal from a decree holding certain shareholders of a corporation liable to creditors, a distinct specification for each creditor is not necessary if the

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[7] An assignment of error which fails to comply with this rule will not be considered unless error plainly appears. McClellan v. Pyeatt (8th Circuit) 1 C. C. A. 613, 50 Fed. 686; Prichard v. Budd (4th Circuit) 22 C. C. A. 504, 76 Fed. 710. See, also, Mitchell v. Marker (6th Circuit) 10 C. C. A. 306, 62 Fed. 140; Haldane v. U. S. (8th Circuit) 16 C. C. A. 447, 69 Fed. 819.

An assignment that "the court erred in its charge," etc., referring to marked lines and numbers in the written opinion for instructions erroneously given and refused, will not be considered. Gallot v. U. S. (5th Circuit) 31 C. C. A. 44, 87 Fed. 446.

This provision does not cover the case of a peremptory direction of a verdict which may be made upon an informal motion. Atchison, T. & S. F. R. Co. v. Meyers (7th Circuit) 22 C. C. A. 268, 76 Fed. 443.

The court will not consider a bill of exceptions to instructions given or refused unless it contains the evidence on which the question of law raised by the instructions arose. It is not enough that the testimony be found in another part of the record. Improvement Co. v. Frari (4th Circuit) 7 C. C. A. 149, 58 Fed. 171.

Assignments of error in relation to instructions asked and refused will be disregarded when they neither quote nor refer to the evidence that shows the relevancy of the propositions of law propounded therein. Newman v. Iron Co. (4th Circuit) 80 Fed. 228, 25 C. C. A. 382; Surety Co. v. Schwerin (4th Circuit) 80 Fed. 638, 26 C. C. A. 45.

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request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.[8]

question of the shareholders' liability to one creditor is not different from that of their liability to other creditors. Andrews v. Pipe Works (7th Circuit) 22 C. C. A. 110, 76 Fed. 166.

Where various errors are complained of, presenting a single proposition of law common to all of them, they need not be separately stated as so many

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[8] Under this clause, the circuit court of appeals may consider questions improperly grouped in one assignment the same as if there were several assignments severally raising the questions. Standard Elevator Co. v. Crane Elevator Co. (7th Circuit) 76 Fed. 767, 22 C. C. A. 549.

The rule that assignments pointing out no particular error will not be reviewed may be disregarded in case of plain error where the merits have been fully considered below, and discussed in the brief of one of the parties. Flagler v. Kidd (2d Circuit) 78 Fed. 341, 24 C. C. A. 123.

An assignment of error based on refusal of an instruction will be considered, though neither the reasons for the refusal nor any part of the general charge appear in the record, where counsel have argued the requested instruction on its merits, and impliedly given the court to understand that it raised a substantial issue. Chapman v. Reynolds (1st Circuit) 77 Fed. 274, 23 C. C. A. 166.

Where one vessel and cargo were totally lost by a collision resulting from mutual fault, and the other vessel, after paying full damages for the lost cargo, was permitted to recoup one-half thereof from the half damages awarded to the owners, officers, and crew of the lost vessel, but the decree was open to the construction that the recoupment was to be pro rata on the sums apportioned to owners, master, and crew, *held* that, in the absence of an assignment of error in respect to the recoupment against the seamen, the appellate court would, of its own motion (seamen being wards of the admiralty), direct that the decree be modified so that the several sums awarded to the mate and crew, who were in no way responsible for the fault of navigation, should be exonerated by, and have priority over, the amounts awarded the owners and master. The Chattahoochee (1st Circuit) 21 C. C. A. 162, 74 Fed. 899; Hendry v. Steamship Co., Id.

In an action to determine an adverse claim under the North Carolina statutes, where the court gave a misleading and insufficient instruction as to the effect of adverse possession, *held*, that in view of the far-reaching consequences of the verdict on this issue, and the special circumstances of the trial, the circuit court of appeals would exercise its discretion, to notice the error, though not properly assigned. Land Co v. Scaife (4th Circuit) 80 Fed. 352, 25 C. C. A. 461; Scaife v. Land Co., Id.

A specification that "the court erred in taking the case from the jury, and directing a verdict for the defendant," is sufficient, under rule 11, providing that the court may, at its option, notice a plain error not assigned, and the proceedings will be reversed when, from the record, there appears nothing to bar a recovery on one cause of action set forth in the declaration, but the new trial in such case will involve only questions affecting such cause. Russell v. Manufacturing Co. (7th Circuit) 83 Fed. 976, 28 C. C. A. 243.

Under the discretion reserved in rule 11, as to noticing errors not assigned, if an assignment which does not comply with the rule has any sound merit, and the court can be satisfied from the whole record that a probable injustice has been done, it will be disposed to notice the error so defectively assigned; but, if the error complained of is highly technical, the record indicating no probable injustice, the court will not incline to leniency in the enforcement of the rule, though, if the error had been correctly assigned, it might have felt constrained to reverse the judgment because of it. Society v. Spiro (6th Circuit) 78 Fed. 774, 24 C. C. A. 334.

The court will not disregard a departure from strict compliance with its rules as to the assignment of errors in order to notice an error which is technical, and probably immaterial. Railroad Co. v. Mulligan (7th Circuit) 14 C. C. A. 547, 67 Fed. 569.

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12.

OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit, or translation, found in the

distinct propositions. Central Trust Co. v. Continental Trust Co. of City of New York (8th Circuit) 30 C. C. A. 235, 86 Fed. 517.

Assignments of error are necessary on appeals as well as on writs of error. Randolph v. Allen (5th Circuit) 19 C. C. A. 353, 73 Fed. 23.

The omission to set out in the title of an assignment of error the names of all the parties to the record whose interests are intended to be, and manifestly may be, affected by the appeal, does not affect the jurisdiction of the circuit court of appeals over the parties whose names were omitted. Andrews v. Pipe Works (7th Circuit) 22 C. C. A. 110, 76 Fed. 166; City of Oconto v. Same, Id.

An assignment of error cannot be accepted as proof of the facts alleged therein, and cannot therefore be considered in the absence of anything else in the record to show that the court did or did not rule as asserted in such assignment. Woodbury v. City of Shawneetown (7th Circuit) 20 C. C. A. 400, 74 Fed. 205.

A statement by counsel, in their assignment of errors, of occurrences and rulings at a trial, is insufficient to warrant a reversal of a judgment. The evidence, rulings, and instructions upon which reliance is placed for a reversal must be embodied in a bill of exceptions before a federal appellate court can consider them. Safe-Deposit Co. v. Allen (8th Circuit) 82 Fed. 148, 27 C. C. A. 87.

In an admiralty suit the circuit court of appeals may, on motion, and for cause shown, permit the filing therein of additional assignments of error, to cover points not specifically included in the original assignments. Cory v. Penco (3d Circuit) 76 Fed. 997, 22 C. C. A. 675.

A question which, though not presented by an explicit specification of error, so underlies other questions that a complete and final disposition of the case would be impossible without deciding it, is sufficiently presented by the record to permit its decision by an appellate court. Andrews v. Pipe Works (7th Circuit) 77 Fed. 774, 23 C. C. A. 454; City of Oconto v. Same, Id.

The court will not consider on appeal a question not raised before the lower court, and not mentioned in the assignment of errors. Third Nat. Bank of Philadelphia v. National Bank of Chester Valley (5th Circuit) 30 C. C. A. 436, 86 Fed. 852.

Upon a writ of error the objection that the circuit court made neither general nor special findings of fact cannot be considered, unless raised by the assignment of errors. Association v. Sparks (8th Circuit) 83 Fed. 225, 28 C. C. A. 399.

On appeal from the circuit court of appeals, the supreme court will not review a portion of a charge to which no exception was taken, and which was not assigned for error in the circuit court of appeals. Eddy v. Lafayette, 16 Sup. Ct. 1082, 163 U. S. 456.

An assignment of error is waived by the failure of plaintiff in error to refer to it in his brief. Railway Co. v. Reeder (5th Circuit) 22 C. C. A. 314, 76 Fed. 550.

An objection and exception to the admission of evidence are not available on error where the grounds of objection are not stated in the bill of exception. The omission is not cured by a statement of the grounds in the assignments of error. Railroad Co. v. St. John (7th Circuit) 85 Fed. 806, 29 C. C. A. 634.

An assignment of error, in submitting to the jury the question whether mortgagees had participated in fraud of the mortgagor in the execution of the conveyance, does not raise the question of error in denying the mortgagees'

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record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

13.

SUPERSEDEAS AND COST BONDS.

1. Supersedeas bonds in the circuit and district courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good.[9] Such in-

motion for a peremptory instruction because plaintiff in attachment failed to show any title to or lien on the mortgaged property. Swoffard Bros. Dry-Goods Co. v. Smith-McCord Dry-Goods Co. (8th Circuit) 85 Fed. 417, 29 C. C. A. 239.

Under an assignment that the court erred in excluding evidence to show that a certain feature of an infringing scene in defendant's play was not a material part of "plaintiff's play," it cannot be held that the court erred in excluding evidence that this feature was not a material part of defendant's play, and that his play continued to be successful after this feature was eliminated. Brady v. Daly (2d Circuit) 83 Fed. 1007, 28 C. C. A. 253.

An objection to the testimony of an expert witness as to the quality of ore produced by a mine as "incompetent, irrelevant, and immaterial" is too general to support a specific assignment of error on the ground that it had not been shown that the witness was at the mine at the particular time inquired about. Sigafus v. Porter (2d Circuit) 84 Fed. 430, 28 C. C. A. 443.

In regard to specifications of error directed to the opinions of the court, and not to the decree entered, see note (*), under rule 14, page clvi., infra.

[9] The supersedeas bond must be approved by the judge or justice. An approval by the clerk alone is insufficient, and is ground for dismissal. Freeman v. Clay (5th Circuit) 1 C. C. A. 115, 48 Fed. 849.

The mere fact that a supersedeas bond which is sufficient in all other respects was taken and approved before the writ of error was sued out is an immaterial irregularity, as the court will presume that it was reapproved upon the issuance of the citation and the allowance of the writ. McClellan v. Pyeatt (8th Circuit) 1 C. C. A. 241, 49 Fed. 259.

A supersedeas bond is insufficient if conditioned to prosecute the appeal to effect, and answer all costs and damages, "in the event the decree is affirmed," instead of "if it fails to make its plea good." Phosphate Co. v. Edwards (5th Circuit) 17 C. C. A. 358, 70 Fed. 728.

R. and S., alleging themselves to compose the firm of W. & Co., applied to the circuit court of appeals for an order staying the execution of six several decrees rendered in a cause in the circuit court, on the ground that they had taken an appeal and given bond. The record did not disclose that they were parties or privies to the suit, although it showed that certain parties had been allowed an appeal from a part of the decrees, and that later, and after the term, an appeal bond naming W. & Co. as a principal had been approved, reciting that W. & Co., among others, "have prosecuted an appeal to reverse the decree." *Held*, that as the bond did not show the names of the individuals composing the firm, nor that W. & Co. was a party or privy, nor that it was approved during the term, nor any particular decree appealed from, nor any citation, the applicants had not taken any appeal, nor given any such bond as to operate as a supersedeas, and that the order applied for should be denied. In re Woerishoffer (5th Circuit) 21 C. C. A. 175, 74 Fed. 915.

An appeal to the circuit court of appeals may be perfected notwithstanding the security has not been given within six months after the entry of the decree sought to be reviewed. Wickelman v. A. B. Dick Co. (2d Circuit) 29 C. C. A. 436, 85 Fed. 851.

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demnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal;[10] but, in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.[11]

2. On all appeals from any interlocutory order or decree granting or continuing an injunction in a circuit or district court, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such circuit or district court a bond to the opposite party, in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal.

[10] A decree which declares a lien on specific property, and requires payment of a sum of money, is not a decree for the recovery of money not otherwise secured, within the meaning of this rule, and the amount of the supersedeas bond need not be the full amount to be paid, but is in the discretion of the court. Railway Co. v. Pope (7th Circuit) 20 C. C. A. 253, 74 Fed. 1.

Sup. Ct. Rule 29 (3 Sup. Ct. xvi.), requires supersedeas bonds, conditioned that the writ of error or appeal shall be prosecuted to effect, to be, where the judgment or decree is "for the recovery of money not otherwise secured," for the whole amount of the judgment or decree, including just damages for delay and costs and interest on the appeal. *Held*, that a judgment rendered against a county for the amount of certain drain warrants, with a provision for mandamus to compel the levy of assessments according to law upon the lands benefited by the drains, was one "for the recovery of money not otherwise secured." Fuller v. Aylesworth (6th Circuit) 75 Fed. 694, 21 C. C. A. 505.

A "judgment for the recovery of money" is one which adjudges a defendant, either as an individual or in a representative capacity, absolutely liable to pay a sum certain to the plaintiff, and awards execution therefor, and which may be fully satisfied by the defendant by paying into court the amount adjudged, with interest and costs; and the fact that the judgment does not involve the personal liability of the defendant is immaterial. Fuller v. Aylesworth (6th Circuit) 75 Fed. 694, 21 C. C. A. 505.

A judgment is "not otherwise secured" within the meaning of the rule, when the court has not, by reason of a lien on property secured to plaintiff otherwise than by the judgment, or by reason of actual custody of property liable to satisfy the claim asserted, the means of making the claim of the plaintiff by subjecting specific property. Fuller v. Aylesworth (6th Circuit) 75 Fed. 694, 21 C. C. A. 505.

[11] This rule does not apply to bonds required upon the allowance of writs of error where no supersedeas is asked or granted. Railway Co. v. Cochran (4th Circuit) 15 C. C. A. 321, 68 Fed. 141.

If the appeal bond is defective in that it runs to only one of the several parties whom the citation makes respondent to the appeal, this defect may be cured after the cause is in the appellate court. Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co. (7th Circuit) 19 C. C. A. 477, 73 Fed. 314.

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14.

WRITS OF ERROR, APPEALS, RETURN, AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.[12]

[12] On an appeal in equity, in the absence of joint stipulation for simplifying the transcript, the clerk should send up the whole of the record, in the strict sense of the word, made as directed by Rev. St. § 750, except that, when there has been a previous appeal, matters preceding the mandate should ordinarily be omitted; and if any parts thereof are omitted, even by joint stipulation, their nature should be indicated. But as to the proofs, entries, and papers on file, "necessary to the hearing of the appeal" (Rev. St. § 698), the clerk, in the absence of joint stipulation, is to be guided ordinarily by the selection of the appellant's solicitor. Nashua & L. R. Corp. v. Boston & L. R. Corp. (1st Circuit) 9 C. C. A. 468, 61 Fed. 237.

Irrelevant papers or proceedings need not be included in the transcript, and it is proper for the clerk to require of counsel for appellant or plaintiff in error a præcipe stating what the transcript shall contain, to attach a copy of such præcipe to the transcript, and certify that the transcript is full and correct according to the præcipe. Burnham v. Railway Co. (7th Circuit) 30 C. C. A. 594, 87 Fed. 168.

On appeal to the circuit court of appeals, the clerk of the court below, being the custodian of the record, is to determine, in the absence of agreement of counsel, what evidence shall be included in the transcript following the note of evidence made under the rule of the court; and, if any omissions are found, relief can be had by certiorari for diminution of the record, as provided by court rule 18. Blanks v. Klein (5th Circuit) 1 C. C. A. 254, 49 Fed. 1. A transcript which contains all the parts of a deposition called for by either party is sufficient. Id.

Where several different proceedings are pending below, arising in the same original suit, and an appeal is taken from a decree rendered in one of them, matters embodied in the record which relate only to the other proceedings will be stricken out on motion. Tuttle v. Claflin (2d Circuit) 31 C. C. A. 419, 88 Fed. 122; In re Lee, Id.

In an action on a policy of life insurance, which was submitted upon an agreed statement of evidential facts from which ultimate facts were to be found, the trial court determined that a notice of assessment was insufficient, under the state laws, but made no special finding as to when the notice was served, what it contained, or to which of several classes of insurance companies provided for by the state laws the defendant belonged. *Held*, that the statement of facts amounted to a mere report of the evidence, which could not be examined, and hence the record, in the absence of a special finding of facts, presented no question for the determination of the appellate court. Raimond v. Terrebonne Parish (1889) 10 Sup. Ct. 57, 132 U. S. 192, followed. Association v. Du Bois (9th Circuit) 85 Fed. 586, 29 C. C. A. 354.

A statement by counsel, in their assignment of errors, of occurrences and rulings at a trial, is insufficient to warrant a reversal of a judgment. The evidence, rulings, and instructions upon which reliance is placed for a reversal must be embodied in a bill of exceptions before a federal appellate court can consider them. Safe-Deposit Co. v. Allen (8th Circuit) 27 C. C. A. 87, 82 Fed. 148.

An assignment of error cannot be accepted as proof of facts alleged therein, and cannot, therefore, be considered, in the absence of anything else in the record to show that the court did or did not rule as asserted in such assignment. Woodbury v. City of Shawneetown (7th Circuit) 20 C. C. A. 400, 74 Fed. 205.

A paper purporting to be a bill of exceptions, and which opens and closes in the appropriate forms of such a bill, cannot be considered as a special find-

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2. In all cases brought to this court by writ of error or appeal to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.*

ing of facts, though it contains an extended statement of the evidence submitted at the trial. Morris v. Canda (5th Circuit) 26 C. C. A. 128, 80 Fed. 739.

A bill of exceptions which the record says is a "substitute for first part of No. 9" cannot be considered, there being nothing to inform the court what No. 9 is. Concentrating Co. v. Oberder (9th Circuit) 79 Fed. 726, 25 C. C. A. 171.

A bill of exceptions entitled "To be Substituted for Instruction No. 8" cannot be considered, it not being the office of a bill of exceptions to serve as an instruction. Concentrating Co. v. Oberder (9th Circuit) 79 Fed. 726, 25 C. C. A. 171.

The fact that papers not in the judgment roll are in the transcript, and certified by the clerk, does not make them any part of the record on appeal, when not brought into the record by any bill of exceptions or agreed statement of facts, or in some other way recognized by the rules or practice of the federal courts. Duncan v. Railroad Co. (9th Circuit) 19 C. C. A. 202, 72 Fed. 808.

Matter not incorporated in the bill of exceptions nor certified to by the clerk, but tacked to the record by counsel without official sanction, constitutes no part of the record. Board of Com'rs v. King (8th Circuit) 15 C. C. A. 93, 67 Fed. 945.

It is not indispensable that an exception to a ruling at the trial should be brought before the appellate court by a bill of exceptions if it fully appears upon the record proper. Wilson v. Pauly (6th Circuit) 18 C. C. A. 475, 72 Fed. 129.

On appeal from a judgment of the circuit court rendered in a suit against the United States under Act Cong. March 3, 1887, the question whether the findings of fact of the lower court support its conclusions of law may be reviewed on seasonable assignments of error, without exceptions having been taken. U. S. v. Ady (8th Circuit) 76 Fed. 359, 22 C. C. A. 223.

Whether a verdict be general or special, a bill of exceptions is not necessary to make it a part of the record. Its proper place is in the docket entry showing its return. Daube v. Iron Co. (7th Circuit) 77 Fed. 713, 23 C. C. A. 420.

On appeal from the order of a district judge in a habeas corpus case, no bill of exceptions is necessary. Solomon v. Davenport (4th Circuit) 30 C. C. A. 664, 87 Fed. 318.

To enable the circuit court of appeals to review the admission or exclusion of evidence, the evidence to which the exception is directed must be in the bill of exceptions. Association v. Sparks (8th Circuit) 83 Fed. 225, 28 C. C. A. 399; Sipes v. Seymour (8th Circuit) 76 Fed. 116, 22 C. C. A. 90.

A certificate merely stating that the papers contained in the transcript are correct copies, without showing that the transcript is a complete one, or that the parties by stipulation designated the papers to be included, or that the clerk was guided by appellant's solicitor, is insufficient, and the appeal will

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*Since the opinion of the trial court is no part of the record, assignments of error which are predicated thereon, or on reasons given by the court for its ruling or decree, are not available. Judgment (C. C. 1897) 81 Fed. 198, affirmed. Evans v. Glass Co. (7th Circuit) 83 Fed. 706, 28 C. C. A. 24; Clark v. Deere & Mansur Co. (7th Circuit) 80 Fed. 534, 25 C. C. A. 619; Association v. Du Bois (9th Circuit) 85 Fed. 586, 29 C. C. A. 354; North America Loan & Trust Co. v. Colonial & U. S. Mortg. Co. (8th Circuit) 83 Fed. 796, 28 C. C. A. 88; McFarlane v. Golling (7th Circuit) 76 Fed. 23, 22 C. C. A. 23; Safe-Deposit Co. v. Burke (7th Circuit) 88 Fed. 630, 32 C. C. A. 67.

In order that the opinion of the court, in a case tried without a jury, may be treated as a special finding of facts, so that assignments of error may be based thereon, its statement of the facts found should not be mingled with the evidence, or with discussions of law or the reasons for the court's conclusions. Association v. Sparks (8th Circuit) 83 Fed. 225, 28 C. C. A. 399.

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3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.[13]

be dismissed on motion. Meyer v. Implement Co. (5th Circuit) 85 Fed. 874, 29 C. C. A. 465.

An authentication stating that "the foregoing is a true, full, and complete record in the above-entitled cause" is sufficient. Pennsylvania Co. for Insurance on Lives, etc., v. Jacksonville, T. & K. W. Ry. Co. (5th Circuit) 5 C. C. A. 53, 55 Fed. 131; Jacksonville, T. & K. W. Ry. Co. v. American Const. Co. (5th Circuit) 6 C. C. A. 249, 57 Fed. 66.

A certificate appended to the transcript was held insufficient when in the following form: "That the foregoing papers, numbered from 1 to 215, both inclusive, is a true, full, and complete transcript of so much of the said record, papers, exhibits, and proceedings in the said cause of * * *, as now appears and is of file and of record in my office; said transcript being true and correct copies of the originals of the several papers, proceedings, depositions, files, and orders therein contained, as they now are of file and of record in my office." Cutting v. Railroad Co. (5th Circuit) 9 C. C. A. 401, 61 Fed. 150.

Where the clerk of the lower court transmits the transcript to the circuit court of appeals under the proper caption, the fact that he certifies on the writ of error that he "therewith transmits to the supreme court of the United States" a duly-certified transcript, etc., is an immaterial mistake. McClellan v. Pyeatt (8th Circuit) 1 C. C. A. 241, 49 Fed. 259.

The jurisdiction of the court of appeals attaches upon the filing of the writ of error in the office of the clerk of the circuit court, and is not defeated by irregularity in the transcript or in its certification. Burnham v. Railway Co. (7th Circuit) 30 C. C. A. 594, 87 Fed. 168; Cotter v. Railroad Co. (6th Circuit) 10 C. C. A. 35, 61 Fed. 747.

Where a writ of error was duly issued and filed by the clerk of the circuit court, but no notation of its filing made, and by mistake a copy was attached to the transcript instead of the original, on production of the original with the citation, and acknowledgment of service thereon, both certified by the clerk, they may be made or recognized as part of the record, or the want of a seal upon the copy may be supplied by an impression of the seal of the appellate court. Burnham v. Railway Co. (7th Circuit) 30 C. C. A. 594, 87 Fed. 168. See, also, Cotter v. Railroad Co. (6th Circuit) 10 C. C. A. 35, 61 Fed. 747.

One who joins in the petition for appeal, though not in the appeal bond, which is executed by his co-appellant, is a party to the appeal; and if, by oversight of the clerk, his name is omitted from the printed record, the error may be corrected by the clerk. Central Trust Co. v. Continental Trust Co. (8th Circuit) 30 C. C. A. 235, 86 Fed. 517.

Where a necessary part of the record has been omitted from the transcript, and is subsequently presented, duly certified, to the court of appeals, it may be made a part of the record by direct order, without writ of certiorari. Burnham v. Railway Co. (7th Circuit) 30 C. C. A. 594, 87 Fed. 168.

The circuit court of appeals will not grant appellants' petition for a mandamus to the clerk of the lower court to certify and transmit a transcript of the record, merely to determine in advance whether a certain deposition is part of the record, where the ordinary procedure is adequate for the purpose. Starcke v. Klein (5th Circuit) 10 C. C. A. 445, 62 Fed. 502.

An appellate court will not make an order authorizing the court below to

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[13] A clerk's certificate, which shows that certain parts of the record were omitted from the transcript by direction of appellant's attorney, is nevertheless sufficient to bar a motion to dismiss the appeal, when it does not appear that the omitted parts are "necessary to the hearing"; and in such case the appellee, if he thinks the transcript defective, must resort to a certiorari or other remedy. Nashua & L. R. Corp. v. Boston & L. R. Corp. (1st Circuit) 9 C. C. A. 468, 61 Fed. 237.

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4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return-day fall in vacation or in term-time and be served before the return-day.[14]

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the supreme court.

15.

TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceeding, in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court, in order that a translation may be there supplied and inserted in the record.

amend the bill of exceptions so as to show whether or not it contains all the evidence; for, if the amendment be to correct a mistake, the court below has authority to allow it, without permission, notwithstanding the lapse of the term; and, if it be not of that character, the power to make it is gone, and cannot be restored by any action of the appellate court. Rollins v. Board (8th Circuit) 78 Fed. 741, 24 C. C. A. 298.

[14] The failure of the judge to sign the citation is a defect which is cured by the filing of the transcript and the entry of a regular appearance by the appellee's counsel. Freeman v. Clay (5th Circuit) 1 C. C. A. 115, 48 Fed. 849.

Where a writ of error is seasonably returned and docketed in the circuit court of appeals in vacation, before the term next ensuing after its allowance, the court may at such term order an alias citation to bring in parties not served with a former citation, though the time for taking the writ has then expired. Altenberg v. Grant (6th Circuit) 83 Fed. 980, 28 C. C. A. 244.

When an appeal is taken and perfected during the term at which the decree is rendered, no citation is necessary. Central Trust Co. v. Continental Trust Co. (8th Circuit) 30 C. C. A. 235, 86 Fed. 517.

An appeal will be dismissed when no citation has been sued out of either court, or when no citation has been served on the appellee or his proctors. Phosphate Co. v. Edwards (5th Circuit) 17 C. C. A. 358, 70 Fed. 728.

Where, after the rendition of judgment in a cause, a writ of error is duly allowed to the defeated party, and a bond is afterwards given and a citation issued, but the citation is not served, and no writ of error is actually issued, the appellate court is without jurisdiction, and the case should be dismissed. Smith v. Ferst (5th Circuit) 14 C. C. A. 96, 66 Fed. 798.

See, also, note 31 to section 11 of the act creating the courts of appeals, page xxxv., supra, and the notes to rule 16, page clix., infra.

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16.

DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case, and file the record thereof with the clerk of this court, by or before the return-day, whether in vacation or in term-time.[15] But, for good cause shown, the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration,[16] the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed, upon producing a certificate, whether in term-time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case, and certifying that such writ of error or appeal has been duly sued out or allowed.[17] And in no case shall the plaintiff in error or appellant be

[15] The rules in regard to the return day of appeals and to the filing of the transcript are directory, and it is within the sound discretion of the court to relieve parties who have not complied therewith. State of Florida v. Charlotte Harbor Phosphate Co. (5th Circuit) 17 C. C. A. 472, 70 Fed. 883.

Where the transcript was filed within 30 days after the appeal was perfected, but not until the next day after the return day of the citation, *held*, that the appeal would not be dismissed; it appearing that the transcript was carried at 5 o'clock on the previous day to the door of the clerk's office to be filed, but that the office had been closed for the day. Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co. (7th Circuit) 19 C. C. A. 477, 73 Fed. 314.

A writ of error will not be dismissed by the circuit court of appeals because return thereof was not made until one day after it was returnable by its terms. Altenberg v. Grant (6th Circuit) 83 Fed. 980, 28 C. C. A. 244.

Where the case is docketed and the record filed before the return day, the appeal will not be dismissed, although the appellant so long delayed the filing of the record that it was impossible for him to file and furnish to the opposite parties the printed copies of the record and his brief within the times prescribed by rules 23 and 24. Jones v. Mann (4th Circuit) 18 C. C. A. 442, 72 Fed. 85.

Where the citation is made returnable 60 days after its date, and the writ of error on a day named which is less than 60 days therefrom, it will be presumed that the fixing of the latter day was an oversight, and the appeal will not be dismissed where the record is filed thereafter, but within 60 days, though rule 16 requires the record to be filed "by or before the return day." McClellan v. Pyeatt (8th Circuit) 1 C. C. A. 241, 49 Fed. 259.

Where, by the misprision of the clerk of the appellate court, an appeal is docketed as of a date prior to the time the decree appealed from was in fact entered, but immediately after the filing of the transcript the appellees moved to dismiss the appeal on other grounds, which motion is overruled, this is a waiver of the irregularity, and the entry may be corrected so as to make the record speak the truth. Elder v. McClaskey (6th Circuit) 17 C. C. A. 251, 70 Fed. 529.

See, also, note 31 to section 11 of the act creating the courts of appeals, page xxxv., supra, and note 14 to rule 14, page clviii., supra.

[16] An order enlarging the time for filing the record, made by a district judge who is not a member of the circuit court of appeals, and who did not sign the citation, is void. West v. Irwin (7th Circuit) 4 C. C. A. 401, 54 Fed. 419.

[17] That the record was not filed in the appellate court by or before the return day, and an order enlarging the time for filing it was not made or asked for until after that day, is not ground for dismissing the appeal, where the

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entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and, if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

17.

DOCKET.

The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such docket shall be called at every term, or adjourned term; and if a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

18.

CERTIORARI.

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit.[18] And all motions for

record has been filed and the cause docketed before the motion to dismiss is made. Andrews v. Thum (1st Circuit) 12 C. C. A. 77, 64 Fed. 149; Railroad v. Ellsworth (7th Circuit) 23 C. C. A. 393, 77 Fed. 664.

It seems that, if the record is filed during the return term, it is seasonable, notwithstanding the requirements of this rule, unless the party appealed against seasonably moves as provided therein. Nashua & L. R. Corp. v. Boston & L. R. Corp. (1st Circuit) 9 C. C. A. 468, 61 Fed. 237.

See, also, note 31 to section 11 of the act creating the courts of appeals, page xxxv., supra, and note 14 to rule 14, page clviii., supra.

[18] Where the question of the sufficiency of the evidence to support the findings of fact made by the court in lieu of a jury is raised, the fact that the bill of exceptions does not embody all the evidence is no ground for dismissing the appeal; the proper remedy is by certiorari for diminution of the record under this rule. Merrill v. Floyd (1st Circuit) 2 C. C. A. 58, 50 Fed. 849.

On appeal to the circuit court of appeals, the clerk of the court below, being the custodian of the record, is to determine, in the absence of agreement of counsel, what evidence shall be included in the transcript following the note of evidence made under the rule of court; and, if any omissions are found, relief can be had by certiorari for diminution of the record under this rule. Blanks v. Klein (5th Circuit) 1 C. C. A. 254, 49 Fed. 1.

Presumptively, the transcript filed in the appellate court is correct, and that

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such certiorari must be made at the first term of the entry of the case; otherwise the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

19.

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and, if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed, and, if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if it be erroneous: provided, however, that a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

2. When the death of a party is suggested, and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a circuit or district court of the United States shall desire to prosecute a writ of error or appeal to this court from any final judgment or decree rendered in the circuit or district court, and, at the time of suing out such writ of error or appeal, the other party to the suit shall be dead, and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some state or territory of the United States, or in the District of Columbia, the party desiring such writ of error or appeal may procure the same,

court has no power by certiorari, upon ex parte affidavits, to cause the record to be amended by inserting a paper which, appellant claims, was introduced before the master, but of which neither the master nor counsel for appellee has any recollection. Randolph v. Allen (5th Circuit) 19 C. C. A. 353, 73 Fed. 23.

Where a necessary part of the record has been omitted from the transcript, and is subsequently presented, duly certified to the court of appeals, it may be made a part of the record by direct order, without writ of certiorari. Burnham v. Railway Co. (7th Circuit) 30 C. C. A. 594, 87 Fed. 168.

Certiorari for the purpose of having additional portions of the evidence incorporated in the record will be denied, where the moving papers do not show that the evidence in question forms a part of the bill of exceptions. Dow v. U. S. (8th Circuit) 27 C. C. A. 42, 81 Fed. 1004.

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and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And, within thirty days after the filing of the record in this court, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some state or territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative, and the state or territory or district in which such representative resides; and, upon such suggestion, he may on motion obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous: provided, however, that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least thirty days before the expiration of such ninety days: provided, also, that in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: and provided, also, that the said representative may at any time, before or after said suggestion, come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

20.

DISMISSING CASES.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.*

* An appellant cannot of right dismiss his own appeal, and, when an appeal is dismissed on his motion, he is not entitled, in the absence of special equitable considerations, to have the order expressed to be without prejudice; but, where an appeal from an interlocutory order granting a preliminary injunction was so dismissed, the order may state the fact that the dismissal was before any

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21.

MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

22.

PARTIES NOT READY.

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial,[19] the defendant may have the plaintiff called, and the writ of error or appeal dismissed.

2. Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

3. When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

23.

PRINTING RECORDS.

The counsel for the plaintiff in error or appellant shall print and file with the clerk of the court, at least six days before the case is called for argument, twenty copies of the record, unless a different order as to such printing is made by the court, either of its own motion, or upon application made at least ten days before the case is called for argument; and shall furnish three copies of the printed record to the adverse party at least six days before the argument. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record. If the record shall not have been printed when the case is reached

hearing on the merits. Donallan v. Patent Co. (1st Circuit) 24 C. C. A. 647, 79 Fed. 385.

An appeal will be dismissed when the parties have settled their differences, and the further prosecution of the appeal is collusive. Benner v. Hayes (7th Circuit) 26 C. C. A. 271, 80 Fed. 953.

[19] The time here meant is not the time of going through the docket to arrange the business of the court, but the time of actual call for trial, and the motion to dismiss cannot be entertained before that time. Lem Hing Dun v. U. S. (9th Circuit) 1 C. C. A. 209, 49 Fed. 145.

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in the regular call of the docket,[20] the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

24.

BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court, at least six days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.[21]

2. This brief shall contain, in order here stated:

(1) A concise abstract or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2) A specification of the errors relied upon,[22] which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged;* and, in cases brought up by appeal, the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous.† When the error al-

[20] The time here meant is not the time of going through the docket to arrange the business of the court, but the time of actual call for trial, and the motion to dismiss cannot be entertained before that time. Lem Hing Dun v. U. S. (9th Circuit) 1 C. C. A. 209, 49 Fed. 145.

[21] The object of this rule and rule 11 is to so present the matter raised by the assignment of error that the court may understand what is the question it is called upon to decide, without going beyond the assignment itself, and also that the party excepting may be confined to the objection taken at the time, which must have been stated specifically. Van Gunden v. Iron Co. (4th Circuit) 3 C. C. A. 294, 52 Fed. 838.

These provisions, particularly in respect to assignments and specifications of error, and the presentation of the questions to be discussed, will be enforced by the court, to the end that the vital issues in the case may be clearly presented, and immaterial and frivolous matters excluded from consideration. City of Lincoln v. Sun Vapor Street-Light Co. (8th Circuit) 8 C. C. A. 253, 59 Fed. 756.

[22] Each specification of the brief should conform substantially to the particular assignment of error on which it is based. Vider v. O'Brien (7th Circuit) 10 C. C. A. 385, 62 Fed. 326.

An assignment of error is waived by the failure of plaintiff in error to refer to it in his brief. Railway Co. v. Reeder (5th Circuit) 22 C. C. A. 314, 76 Fed. 550.

An assignment of error, stating that there is error, in that the court, on the whole evidence, should have rendered a decree for complainant, is too general, and cannot be aided by specifications in the brief. Doe v. Mining Co. (9th Circuit) 70 Fed. 455, 17 C. C. A. 190.

*An exception and specification of error directed to a portion of a charge to a jury containing several propositions, some of which are favorable to the exceptant, are not available to raise the question of error in such charge. Pickham v. Manufacturing Co. (7th Circuit) 77 Fed. 663, 23 C. C. A. 391.

†The specifications of error in a case brought up by appeal should be, not that the evidence shows this or that, but that in this or that particular, separately stated, the decree is erroneous. Andrews v. National Foundry & Pipe-

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leged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected.** When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused.[23] When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report, and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point.[24] When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

Works (7th Circuit) 76 Fed. 166, 22 C. C. A. 110, and 36 L. R. A. 139; City of Oconto v. Same, Id.

Specifications that "the court erred in directing a decree for the complainants without considering and providing for the just and equitable claim of the defendant," and "the court erred in disregarding the equities of the controversy," are insufficient. McFarlane v. Golling (7th Circuit) 76 Fed. 23, 22 C. C. A. 23.

**When a specification of error as to the rejection of evidence states only the subject of the evidence, and does not give its substance, and the brief contains no reference to the page of the record showing the ruling, the matter is not properly brought to the attention of the court. Migeon v. Railway Co. (9th Circuit) 23 C. C. A. 156, 77 Fed. 249; Haldane v. U. S. (8th Circuit) 16 C. C. A. 447, 69 Fed. 819; Safe-Deposit Co. v. Allen (8th Circuit) 27 C. C. A. 87, 82 Fed. 148. See, also, note to Ladd v. Mining Co. (8th Circuit) 14 C. C. A. 248.

[23] An assignment of error in giving instructions will not be considered where it fails to comply with this rule, which requires that the part of the charge referred to be set out in totidem verbis. McClellan v. Pyeatt (8th Circuit) 1 C. C. A. 613, 50 Fed. 686.

The court will not consider a bill of exceptions to instructions given or refused, unless it contains the evidence on which the question of law raised by the instructions arose. It is not enough that the testimony be found in another part of the record. Improvement Co. v. Frari (4th Circuit) 7 C. C. A. 149, 58 Fed. 171.

[24] Assignments of error relating to the admission of evidence will not be considered where they do not quote the full substance of the evidence admitted, and the brief of plaintiff in error does not point out the pages of the record containing such evidence and the exceptions to its admission. Safe-Deposit Co. v. Allen (8th Circuit) 82 Fed. 148, 27 C. C. A. 87; Haldane v. U. S. (8th Circuit) 69 Fed. 819, 16 C. C. A. 447; Migeon v. Railway Co. (9th Circuit) 77 Fed. 249, 23 C. C. A. 156; Sipes v. Seymour (8th Circuit) 76 Fed. 116, 22 C. C. A. 90. See, also, note to Ladd v. Mining Co. (8th Circuit) 14 C. C. A. 248.

If counsel for plaintiff in error considers the errors he assigns too trivial to warrant him in finding and citing the pages of the record which present them, the court will not search for them. Hoge v. Magnes (8th Circuit) 85 Fed. 355, 29 C. C. A. 564.

Specifications of error which, though quoted in the brief, are not therein supported by argument or citation, or even a suggestion to point out the question intended to be raised, must be regarded as waived, even if they have been noticed on the argument. Pickham v. Manufacturing Co. (7th Circuit) 77 Fed. 663, 23 C. C. A. 391.

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3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.††

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and, when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but, if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

25.

ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion: provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

26.

FORM OF PRINTED RECORDS, ARGUMENTS, AND BRIEFS.

All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume.

†† See note 8 to rule 11, page cli., supra.

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27.

COPIES OF RECORDS AND BRIEFS.

The clerk shall carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, and arguments filed therein.

28.

OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.
2. The original opinions of the court shall be filed with the clerk of this court for preservation.
3. Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but, at the end of each term, the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded, within the meaning of this rule.

29.

REHEARING.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel;[25] and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

[25] A petition for rehearing not supported by a certificate of counsel should be denied. Hinds v. Keith (5th Circuit) 6 C. C. A. 231, 57 Fed. 10.

Petitions for rehearings are regulated by this rule, and no new matter can be introduced upon such a petition. Therefore, except in special cases, and then only by leave of court, no cases can be filed except the petition itself in the form prescribed in the rule. Gregory v. Pike (1st Circuit) 15 C. C. A. 33, 67 Fed. 837.

The fact that a case is one of great importance is not sufficient ground for granting a rehearing when there is no suggestion that any consideration or authority entitled to weight has been overlooked; and this is especially true in cases arising under the constitution and laws of the United States, as to which the decisions of this court are not made final by section 6 of the judiciary act of March 3, 1891. Camfield v. U. S. (8th Circuit) 14 C. C. A. 228, 67 Fed. 17.

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30.

INTEREST.

1. In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state or territory where such judgment was rendered.[26]

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed, if specially directed by the court.

31.

COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.*

[26] The purpose of this rule is to give to suitors whose money decrees are affirmed, interest thereon from the date of their entry until paid, if, by the state law, interest might have been allowed in the state courts, and at the rate provided by the state law; but it was not the intention to adopt state rules of practice in reference to the necessity for an express provision in the judgment or decree appealed from for the allowance of interest. The allowance of such interest, however, is within the power of the circuit court of appeals alone; and, when a decree making no provision for interest is affirmed by a decree and mandate also silent on that point, the lower court has no power to allow interest. Hagerman v. Moran (9th Circuit) 21 C. C. A. 242, 75 Fed. 97.

*Plaintiffs brought an action in the United States circuit court, whose jurisdiction of the case rested wholly upon diverse citizenship, alleging in their complaint that they were residents of the state of Montana, but failing to allege that they were citizens thereof. The defendants answered. There was a protracted trial of the case, resulting in a verdict and judgment for the plaintiffs. The defendants moved for a new trial, upon numerous grounds. This motion was denied. The defendants then presented voluminous bills of exceptions, sued out a writ of error, and presented numerous assignments of error. At no stage of the proceedings, until the hearing in the circuit court of appeals, did the defendants suggest the defect in the allegations of citizenship, nor the want of jurisdiction; but, upon such a hearing, they moved to dismiss the writ of error, and remand the cause, with instructions to dismiss it, for want of jurisdiction. It clearly appeared from the record, though not by direct averment, that the necessary diversity of citizenship existed. *Held* that, as the court was without jurisdiction, because of the defective averment, the cause would be remanded for appropriate action by the circuit court, which might, in its discretion, permit an amendment; but, as the writ of er-

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2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.[27]

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court.† The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party, but in such cases no costs shall be allowed in this court for or against the United States.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

nor was superfluous, the costs thereof would be taxed against the defendants. Boarman, District Judge, dissenting. Hunt v. Howes (5th Circuit) 21 C. C. A. 356, 74 Fed. 657.

[27] Upon the affirmance of a judgment, with costs, by the circuit court of appeals, an attorney's fee of $20 is taxable against plaintiff in error, as this is the uniform practice of the supreme court under a rule identical with the above rule, and as the act creating the circuit court of appeals declares that "the costs and fees in the supreme court now provided for by law shall be costs and fees in the circuit courts of appeals." Railroad Co. v. McDonald (8th Circuit) 9 C. C. A. 129, 60 Fed. 522.

That the appellate court sustains the decree of the court below on grounds other than those assigned by the latter court is not necessarily a reason for depriving the appellees of their costs on appeal, especially when the appellate court has not found it necessary to go to the extent of considering the reasons on which the court below decided the case. Post v. Electrical Co. (1st Circuit) 32 C. C. A. 151, 89 Fed. 1.

Where the appellant appeals from the whole decree, but only succeeds in modifying it in a minor particular, neither party will be given the costs of the appellate court. Packard v. Lacing-Stud Co. (1st Circuit) 16 C. C. A. 639, 70 Fed. 66, followed. New England R. Co. v. Carnegie Steel Co. (1st Circuit) 21 C. C. A. 219, 75 Fed. 54.

The appellate courts cannot undertake to apportion the costs therein, between the parties, in all cases in which the judgment is affirmed in part and reversed in part. Tefft v. Stern (6th Circuit) 21 C. C. A. 73, 74 Fed. 755.

† Where the appeal has substantially prevailed, as where the decree is reversed as to the most important part, the appellant is entitled to the statutory costs. Trust Co. v. Snyder (7th Circuit) 77 Fed. 818, 23 C. C. A. 480.

On a libel for a collision in which libelant's vessel was sunk, the claimants set forth in their answer certain damages to their own vessel, but filed no cross libel. The district court found the claimants' vessel solely in fault, and decreed accordingly. On appeal the circuit court of appeals reversed the decree, deciding that both vessels were in fault, and that the damages should be equally divided. *Held*, that the appellants were entitled to full costs of the appellate court, and that the costs of the district court should be equally divided. The Horace B. Parker (1st Circuit) 76 Fed. 238, 22 C. C. A. 418; Chisholm v. Abbott, Id.

Where the appellant appeals from the whole decree, but only succeeds in modifying it in a minor particular, neither party will be given the costs of the appellate court. New England R. Co. v. Carnegie Steel Co. (1st Circuit) 75 Fed. 54, 21 C. C. A. 219.

The appellate courts cannot undertake to apportion the costs therein, between the parties, in all cases in which the judgment is affirmed in part and reversed in part. Tefft v. Stern (6th Circuit) 21 C. C. A. 73, 74 Fed. 755.

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6. In all cases certified to the supreme court or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the supreme court.

32.

MANDATE.

In all cases finally determined in this court, a mandate, or other proper process in the nature of a procedendo, shall be issued, on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.[28]

33.

CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

34.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material, forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least ten days before the case is heard or submitted.

2. All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

[28] It is not necessary to recite in the mandate every step in the various stages of the cause. Andrews v. Thum (1st Circuit) 18 C. C. A. 566, 72 Fed. 290. See, also, note 30 to section 10 of the act creating the court of appeals, page xxxiv., supra.

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ORDER OF SUPREME COURT.

TABLE OF FEES.

Ordered, that the table of fees and costs in the circuit courts of appeals, established in pursuance of the act of congress of February 19, 1897, by order of January 10, 1898, be, and the same is hereby, amended as to the item for "Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index, .15," by substituting twenty-five cents in place of fifteen cents, for each printed page, so that said order as amended shall read as follows:

Ordered, in pursuance of the act of congress of February 19, 1897 (29 Stat. 536, c. 263), that the following table of fees and costs in the circuit courts of appeals be, and the same is hereby, established, to take effect on the first day of March, A. D. 1898, and no other fees and costs than those therein named shall thereafter be charged:

Docketing a case and filing the record	$ 5 00
Entering an appearance	25
Transferring a case to the printed calendar	1 00
Entering a continuance	25
Filing a motion, order, or other paper	25
Entering any rule, or making or copying any record or other paper, for each one hundred words	20
Entering a judgment or decree	1 00
Every search of the records of the court and certifying the same	1 00
Affixing a certificate and a seal to any paper	1 00
Receiving, keeping, and paying money, in pursuance of any statute or order of court, one per cent. on the amount so received, kept and paid.	
Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index	25
Making a manuscript copy of the record, when required by the rules, for each one hundred words (but nothing in addition for supervising the printing)	20
Issuing a writ of error and accompanying papers, or a mandate or other process	5 00
Filing briefs, for each party appearing	5 00
Copy of an opinion of the court, certified under seal, for each printed page (but not to exceed five dollars in the whole for any copy)	1 00
Attorney's docket fee	20 00

I, James H. McKenney, clerk of the supreme court of the United States, do hereby certify that the foregoing is a true copy of the order of said supreme court entered on February 28, 1898, in pursuance of the act of congress of February 19, 1897, as the same remains upon the files and records of said supreme court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said supreme court, at the city of Washington, this 11th day of March, A. D. 1898.

[Seal.] JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

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JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

FIRST CIRCUIT.

Hon. HORACE GRAY, Circuit Justice..... Washington, D. C.
Hon. LE BARON B. COLT, Circuit Judge..... Bristol, R. I.
Hon. WILLIAM L. PUTNAM, Circuit Judge..... Portland, Me.
Hon. NATHAN WEBB, District Judge, Maine..... Portland, Me.
Hon. EDGAR ALDRICH, District Judge, New Hampshire.....Littleton, N. H.
Hon. THOMAS L. NELSON, District Judge, Massachusetts.[1]..... Worcester, Mass.
Hon. FRANCIS C. LOWELL, District Judge, Massachusetts.[2]..... Boston, Mass.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island..... Providence, R. I.

SECOND CIRCUIT.

Hon. RUFUS W. PECKHAM, Circuit Justice..... Washington, D. C.
Hon. WILLIAM J. WALLACE, Circuit Judge..... Albany, N. Y.
Hon. E. HENRY LACOMBE, Circuit Judge..... New York, N. Y.
Hon. NATHANIEL SHIPMAN, Circuit Judge..... Hartford, Conn.
Hon. WILLIAM K. TOWNSEND, District Judge, Connecticut..... New Haven, Conn.
Hon. ALFRED C. COXE, District Judge, N. D. New York..... Utica, N. Y.
Hon. ADDISON BROWN, District Judge, S. D. New York..... New York, N. Y.
Hon. CHARLES L. BENEDICT, District Judge, E. D. New York.[3]..... Brooklyn, N. Y.
Hon. ASA W. TENNEY, District Judge, E. D. New York.[4]..... Brooklyn, N. Y.
Hon. EDWARD B. THOMAS, District Judge, E. D. New York.[5].. 29 Liberty St., New York.
Hon. HOYT H. WHEELER, District Judge, Vermont..... Brattleboro, Vt.

THIRD CIRCUIT.

Hon. GEORGE SHIRAS, Jr., Circuit Justice..... Washington, D. C.
Hon. MARCUS W. ACHESON, Circuit Judge..... Pittsburgh, Pa.
Hon. GEORGE M. DALLAS, Circuit Judge..... Philadelphia, Pa.
Hon. EDWARD G. BRADFORD, District Judge, Delaware.[6]..... Wilmington, Del.
Hon. ANDREW KIRKPATRICK, District Judge, New Jersey..... Trenton, N. J.
Hon. WILLIAM BUTLER, District Judge, E. D. Pennsylvania..... Philadelphia, Pa.
Hon. JOSEPH BUFFINGTON, District Judge, W. D. Pennsylvania..... Pittsburgh, Pa.

[1] Deceased November 21, 1897.
[2] Commissioned January 10, 1898.
[3] Resigned June 5, 1897, to take effect on appointment of successor.
[4] Confirmed July 8, 1897. Deceased December 10, 1897.
[5] Commissioned February 15, 1898.
[6] Confirmed May 11, 1897.

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FOURTH CIRCUIT.

Hon. MELVILLE W. FULLER, Circuit Justice.....Washington, D. C.
Hon. NATHAN GOFF, Circuit Judge..... Clarksburg, W. Va.
Hon. CHARLES H. SIMONTON, Circuit Judge..... Charleston, S. C.
Hon. THOMAS J. MORRIS, District Judge, Maryland..... Baltimore, Md.
Hon. AUGUSTUS S. SEYMOUR, District Judge, E. D. North Carolina.[1]... New Berne, N. C.
Hon. THOMAS R. PURNELL, District Judge, E. D. North Carolina.[2]..... Raleigh, N. C.
Hon. ROBERT P. DICK, District Judge, W. D. North Carolina.[3]..... Greensboro, N. C.
Hon. HAMILTON G. EWART, District Judge, W. D. North Carolina.[4]..Hendersonville, N. C.
Hon. WILLIAM H. BRAWLEY, District Judge, E. and W. D. South Car...Charleston, S. C.
Hon. ROBERT W. HUGHES, District Judge, E. D. Virginia.[5]..... Norfolk, Va.
Hon. EDMUND WADDILL, Jr., District Judge, E. D. Virginia.[6]..... Richmond, Va.
Hon. JOHN PAUL, District Judge, W. D. Virginia..... Harrisonburg, Va.
Hon. JOHN J. JACKSON, District Judge, West Virginia..... Parkersburg, W. Va.

FIFTH CIRCUIT.

Hon. EDWARD D. WHITE, Circuit Justice..... Washington, D. C.
Hon. DON A. PARDEE, Circuit Judge..... New Orleans, La.
Hon. A. P. McCORMICK, Circuit Judge..... Dallas, Tex.
Hon. JOHN BRUCE, District Judge, M. and N. D. Alabama..... Montgomery, Ala.
Hon. HARRY T. TOULMIN, District Judge, S. D. Alabama..... Mobile, Ala.
Hon. CHARLES SWAYNE, District Judge, N. D. Florida..... Jacksonville, Fla.
Hon. JAMES W. LOCKE, District Judge, S. D. Florida..... Key West, Fla.
Hon. WILLIAM T. NEWMAN, District Judge, N. D. Georgia..... Atlanta, Ga.
Hon. EMORY SPEER, District Judge, S. D. Georgia..... Macon, Ga.
Hon. CHARLES PARLANGE, District Judge, E. D. Louisiana..... New Orleans, La.
Hon. ALECK BOARMAN, District Judge, W. D. Louisiana..... Shreveport, La.
Hon. HENRY C. NILES, District Judge, N. and S. D. Mississippi..... Kosciusko, Miss.
Hon. DAVID E. BRYANT, District Judge, E. D. Texas..... Sherman, Tex.
Hon. JOHN B. RECTOR, District Judge, N. D. Texas.[7]..... Dallas, Tex.
Hon. EDWARD R. MEEK, District Judge, N. D. Texas.[8].....Ft. Worth, Tex.
Hon. THOMAS S. MAXEY, District Judge, W. D. Texas..... Austin, Tex.

SIXTH CIRCUIT.

Hon. JOHN M. HARLAN, Circuit Justice..... Washington, D. C.
Hon. WILLIAM H. TAFT, Circuit Judge..... Cincinnati, Ohio.
Hon. HORACE H. LURTON, Circuit Judge..... Nashville, Tenn.
Hon. JOHN WATSON BARR, District Judge, Kentucky..... Louisville, Ky.
Hon. HENRY H. SWAN, District Judge, E. D. Michigan..... Detroit, Mich.
Hon. HENRY F. SEVERENS, District Judge, W. D. Michigan..... Kalamazoo, Mich.
Hon. AUGUSTUS J. RICKS, District Judge, N. D. Ohio..... Cleveland, Ohio.
Hon. GEORGE R. SAGE, District Judge, S. D. Ohio..... Cincinnati, Ohio.
Hon. CHARLES D. CLARK, District Judge, E. and M. D. Tennessee.. Chattanooga, Tenn.
Hon. ELI S. HAMMOND, District Judge, W. D. Tennessee..... Memphis, Tenn.

[1] Deceased February 19, 1897.
[2] Confirmed May 5, 1897.
[3] Resigned January 12, 1898, to take effect on appointment of successor.
[4] Commissioned July 13, 1898.
[5] Resigned March 4, 1898.
[6] Commissioned March 22, 1898.
[7] Deceased April 9, 1898.
[8] Commissioned July 13, 1898.

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SEVENTH CIRCUIT.

Hon. HENRY B. BROWN, Circuit Justice..... Washington, D. C.
Hon. WILLIAM A. WOODS, Circuit Judge..... Indianapolis, Ind.
Hon. JAMES G. JENKINS, Circuit Judge..... Milwaukee, Wis.
Hon. JOHN W. SHOWALTER, Circuit Judge..... Chicago, Ill.
Hon. PETER S. GROSSCUP, District Judge, N. D. Illinois..4259 Grand Boulevard, Chicago.
Hon. WILLIAM J. ALLEN, District Judge, S. D. Illinois..... Springfield, Ill.
Hon. JOHN H. BAKER, District Judge, Indiana..... Goshen, Ind.
Hon. WILLIAM H. SEAMAN, District Judge, E. D. Wisconsin..... Sheboygan, Wis.
Hon. ROMANZO BUNN, District Judge, W. D. Wisconsin..... Madison, Wis.

EIGHTH CIRCUIT.

Hon. DAVID J. BREWER, Circuit Justice..... Washington, D. C.
Hon. HENRY C. CALDWELL, Circuit Judge..... Little Rock, Ark.
Hon. WALTER H. SANBORN, Circuit Judge..... St. Paul, Minn.
Hon. AMOS M. THAYER, Circuit Judge..... St. Louis, Mo.
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Hon. JOSEPH McKENNA, Circuit Justice.[12]..... San Francisco, Cal.
Hon. JOSEPH McKENNA, Circuit Judge.[13]..... San Francisco, Cal.

[1] Deceased November 17, 1896.
[2] Commissioned December 15, 1896.
[3] Resigned May 16, 1896.
[4] Commissioned May 18, 1896. Confirmed same date.
[5] Deceased October 28, 1896.
[6] Resigned.
[7] Deceased August 8, 1896.
[8] Commissioned August 31, 1896. Confirmed February 18, 1897.
[9] Deceased August 9, 1896.
[10] Commissioned December 15, 1896.
[11] Resigned December 1, 1897.
[12] Commissioned January 21, 1898.
[13] Resigned.

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Hon. OLIN WELLBORN, District Judge, S. D. California ..... Los Angeles, Cal.
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Hon. CORNELIUS H. HANFORD, District Judge, Washington ..... Seattle, Wash.
Hon. THOMAS P. HAWLEY, District Judge, Nevada ..... Carson City, Nev.
Hon. CHARLES B. BELLINGER, District Judge, Oregon ..... Portland, Ore.
Hon. JAMES H. BEATTY, District Judge, Idaho ..... Boise City, Idaho.
Hon. ARTHUR K. DELANEY, District Judge, Alaska.[3] ..... Juneau.
Hon. CHARLES S. JOHNSON, District Judge, Alaska.[4] ..... Sitka.

[1] Commissioned May 20, 1897.
[2] Commissioned June 8, 1897.
[3] Removed.
[4] Commissioned July 28, 1897.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS.

(87 Fed. 329.)

SAFFER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. May 9, 1898.)

No. 993.

1. CRIMINAL LAW—EVIDENCE—SUBSEQUENT CRIMES—RELEVANCY.
   On a trial for mailing lewd and lascivious letters, in which the only issue for the jury is whether they were sent through the mails or in some other way, evidence of subsequent illicit relations between the writer and the addressee of the letters is irrelevant.[1]
2. WITNESS—CROSS-EXAMINATION.
   A witness may not be cross-examined upon a subject concerning which he has not testified in chief, unless such cross-examination is in the form which lays a proper foundation for impeachment.
3. SAME—IMPEACHMENT.
   When a witness is cross-examined on a matter collateral to the issue, his answer cannot be subsequently contradicted by the party who put the questions.

In Error to the District Court of the United States for the Western District of Arkansas.

Wm. M. Cravens, for plaintiff in error.

F. A. Youmans, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. The plaintiff in error, L. A. Saffer, pleaded not guilty to an indictment for mailing two lewd and lascivious letters on July 15, 1895, and on August 6, 1895, respectively, and after a trial by a jury was convicted, and sentenced to imprisonment at hard labor in the penitentiary at Ft. Leavenworth for two years. The trial court declared the letters to be lewd and lascivious as a matter of law, and the only question submitted to the jury was whether or not they were mailed. Upon this issue the testimony was conflicting. After the plaintiff in error had testified that they never were

[1] As to nonmailable matter generally, see note to Timmons v. U. S., 30 C. C. A. 74.

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transmitted through the mails, but that one of them was handed by him personally to the woman to whom it was addressed, and that the other was sent to her by a special messenger, the district attorney was permitted, over the objection of counsel for the accused, to ask him whether or not, in January, 1896, he and the addressee of the letters registered at an hotel in Ft. Smith, in the state of Arkansas, and occupied the same room, as John Jones and wife. After he had answered that they did not, the district attorney was allowed to introduce evidence, over like objections, that they did, and that at another time and place, months after the letters were delivered, they were seen in a water-closet together. These and many other rulings of the court below are assigned as error. What relevancy this testimony had to the question whether or not these letters were sent through the mails, or to the question whether the letters were lewd and lascivious or not, or to the question whether the testimony of the defendant was credible or not, it is difficult to perceive. The fact, if it was a fact, that the accused committed adultery with the addressee of the letters, or that he frequented a closet with her, is certainly not evidence that he mailed a lewd and lascivious letter to her six months before. It is too well settled for consideration or discussion that proof of the subsequent commission of another crime is no evidence of the earlier commission of a like or a different crime. People v. O'Brien, 96 Cal. 171, 31 Pac. 45; Clapp v. State, 94 Tenn. 186, 30 S. W. 214; People v. Fowler, 104 Mich. 449, 453, 454, 62 N. W. 572, 574. There was nothing in the direct examination of the plaintiff in error bearing upon his relations with the addressee of these letters, and no foundation there for the question propounded to him on cross-examination, and neither that question nor any answer that might be made to it could have any tendency to impeach his character for truth and veracity. Moreover, if that question and its answer had been competent, the rebutting evidence which contradicted the answer was clearly incompetent. The matter in issue was whether or not the lewd letters were mailed. The question whether or not the accused and the addressee of the letters registered as man and wife and occupied the same room six months later was entirely collateral to this issue. "When a witness is cross-examined on a matter collateral to the issue, his answer cannot be subsequently contradicted by the party putting the question." Whart. Cr. Ev. § 484, and cases cited in note 6. There is no ground on which the introduction of this evidence can be sustained, and the questions it presents are too elementary to warrant discussion. The judgment below is reversed, and the case is remanded to the district court, with directions to grant a new trial.

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(87 Fed. 333.)

CAPITAL SHEET-METAL CO. v. KINNEAR & GAGER CO.

(Circuit Court of Appeals, Sixth Circuit. April 5, 1898.)

No. 547.

1. PATENTS—INVENTION—ANALOGOUS USE.
   The substitution of rounded corners in the panels of metallic ceilings for the sharp angles previously used in like panels involves no invention, it appearing that the advantage of making rounded corners in other articles constructed from sheet metals than ceiling panels was well understood by artisans.
2. SAME—METALLIC CEILING PANELS.
   The Kinnear patent, No. 383,285, for improvements in metallic ceilings, is void for want of invention as to claim 2, in which the only feature of novelty is the making of the panels with round corners. 81 Fed. 491, reversed.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

This was a suit in equity by the Kinnear & Gager Company against the Capital Sheet-Metal Company for alleged infringement of a patent for improvements in metallic ceilings. The circuit court rendered a decree for complainant (81 Fed. 491), and the defendant has appealed.

C. C. Shepard, for appellant.

D. F. Patterson, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge. This is a suit in equity, brought by the Kinnear & Gager Company, the appellee here, against the Capital Sheet-Metal Company, the appellant, complaining of the infringement of the rights secured by letters patent No. 383,285 to William R. Kinnear, issued August 21, 1888, which were subsequently assigned to the appellee. The patent was for improvements in metallic ceilings, and relates specifically to the form of panels used for that purpose. The second claim of this patent, which is the only one in controversy here, is this:

"(2) In a ceiling such as described, panels thereof constructed from continuous sheets, and having margins raised above the body, and the connecting portion between the body of the panels and the margins having rounded corners, substantially as described."

The defendant in the court below, by its answer, did not deny that it was constructing metallic panels in substantially the same form as those described in the patent, and covered by the second claim thereof. Thus the question of infringement is not involved. But the answer denied that the patentee was the true, original, and first inventor of the device covered by the letters patent mentioned in the bill, and averred that the device was not an invention when produced by the said William R. Kinnear, and that it was not novel at the time of said invention; and this averment constitutes

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the substance of the controversy. The case was heard in the circuit court upon the pleadings and proof. The court sustained the validity of the patent, and entered a decree for the complainant; the court being of opinion that, although there had been previous constructions of substantially the same form, yet that their transfer to and employment in the construction of ceilings was an application to a new use so remotely allied to any previous use as to indicate the presence of invention. To this conclusion we cannot agree. The invention professes to be one of improvements in metallic ceilings, and relates to the formation of the panels of which such ceilings are composed, so constructed as to obviate the liability to breakage in the corners incident to the panels of the ordinary construction. In the specification the patentee says:

"In panels of this nature having the edges raised above the body as constructed heretofore, the connecting moldings, C, of the adjoining sides meet at a sudden angle. Under this plan, when the sheets are stamped the metal is liable to be torn at the outer edges, where the strain is greatest, by offering to the strain the metal partly broken by forming the angle. This, by dragging the edge open, presented an unsightly appearance, which has to be relieved by soldering in the corner an additional piece of metal in which the angle is already formed. It is to obviate this difficulty that I now stamp my sheets with the rounded corner shown in the drawings."

By comparing the panels of the Kinnear patent with the panels described in former patents and those which had been in previous use, it is seen that the only advance made by the invention embodied in claim 2 is in giving rounded corners to the connecting portion between the body or large central portion of the panel and the margins of the panel. One Henry Adler, of Pittsburg, Pa., had some time prior to May 20, 1874, devised a plan for making metallic ceilings in thin panels which showed a depressed body with flanges turned up at the edges to be secured to the ribs which framed the spaces into which the ceiling was divided, and made application for a patent thereon May 20, 1874. Upon this application letters patent No. 158,881 were issued January 19, 1875. On November 24, 1885, letters patent were issued to Albert Northrop, also of Pittsburg, for improvements in metallic ceilings composed of panels, the main portion or body of which was flat and the margins raised with a connecting portion extending from the body upward to the margin. In the panels of the Northrop patent the margin and the portion connecting it with the body were cut out at the corners of the panel down to the body thereof. The only difference material to be noticed between the Northrop patent and the patent in suit consists in the fact that in the Northrop patent the corners were cut away, as just stated, while in Kinnear's patent the corners of the margin and connecting portion were made full and round.

This claim 2 in Kinnear's patent makes no reference to the ornamentation of the panel, nor to any peculiarity in its form which has special reference to any mode of connecting one panel with another in the ceiling. Forms of thin metal swaged or struck up with dies corresponding to the form of the panel described in the claim in question had been in common use for various familiar purposes long previous to the date of Kinnear's application for a patent. Ex-

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amples of these are found in the instances referred to in the proofs in the present case, such as tea trays, lids of coal vases, and baking pans. Others, like the wrought-iron sink in the Kilbourne patent which was in suit in the case of Kilbourne v. W. Bingham Co., 1 C. C. A. 617, 50 Fed. 697, and the instances mentioned in the opinion in that case, may be referred to as illustrations. The prior existence of such constructions is not, as we understand, disputed by counsel for the appellees, but the contention is that such a form had not before been thought of in the use of panels for ceilings. That the making of the angles in a circular form with dies appropriately shaped would render them stronger and more useful in keeping them clean and for appearance sake, was well known; indeed, the fact dwelt upon in the specification that they would be less liable to fracture in constructing them, and less liable to breakage in use, was well known to every one at all acquainted with the art of making them, or their subsequent use. The question, therefore, comes to this: whether, in view of the facts that panels of metallic sheets had been made in such forms as were shown by the Adler and Northrop patents, that the forms of the identical construction called for by this second claim had been so long in common use in other articles as to be familiar to everybody, and that the advantages of making the corners round were well understood by every artisan, the adoption of that form into the construction of thin metallic plates for panels in ceilings involved invention. It is earnestly insisted that there is evidence that it did in the fact that no one else appears to have thought of it before Kinnear, but this is a suggestion which is applicable to every step in the progress of the arts and to the production of every new thing. Long practice and observation naturally lead those familiar with the arts to the perception of new adaptations. Mechanical education and skill, fostered and promoted by the public, are rapidly advancing in every direction, and there is a constant and universal endeavor in handicraft to utilize that which is known, and press it into service in the practical arts. But the steps of this normal progress and improvement are not invention, nor the subject of monopoly to one who, in the exercise of the "skill of his calling," has put an old thing to a new use. It does not seem to us possible that the substitution of rounded corners in these panel plates for the sharp angles of the old construction referred to by Kinnear in the extract above quoted from his specification is indicative of anything more than the exercise of the common skill and judgment of those trained in the art to which the subject relates. Kinnear, in his specification, after stating the objects of his invention, says: "It consists in constructing the panels so that the sharp angles at the corners, which weaken the metal, and render it liable to breakage at those points, both in the manufacture and by the change of temperature, are avoided." And this, so far as it is involved in the second claim, is all that there is of his invention, for it was not new to make the panels of continuous sheets, with margins raised above the body by a connecting portion. It is suggested in the opinion of the court below that the continuous sheets of the Kinnear patent are not the same as the continuous sheets of the Northrop patent, but the

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"continuous sheets" are not more particularly described and mean no more than that they are one sheet, and not made up of parts. The panels of the Northrop patent, as well as those of Adler, conform to this description. For the reasons we have given, we think the improvement embodied in the second claim does not constitute a patentable invention. The decree below must be reversed, and the case remanded, with directions to dismiss the bill, with the costs of both courts.

(87 Fed. 361.)

THE H. C. WAHLBERG.

LORENTZEN v. SCHLEHEN et al.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1898.)

No. 384.

1. MARITIME LIENS—SALE OF CARGO—DISPOSITION OF PROCEEDS.
   Where one, under contract to purchase the entire catch of a schooner upon a proposed seal-hunting expedition, lent money to her owner and master upon the security of a mortgage on the schooner, and later advanced money for the wages of her crew, and for necessary repairs and supplies in a foreign port, *held*, that the proceeds of sale of the catch should be first applied to reimbursement of the latter advances, in so far as they were justified, rather than to payment of the loan.
2. SEAMEN—WAGES—FORFEITURE.
   Where shipping articles provide that members of the crew shall not be entitled to wages until return to the home port, their refusal, in a foreign port, to proceed with the voyage, no excuse for such refusal appearing, works a forfeiture of their right to wages.

Appeal from the District Court of the United States for the Northern District of California.

Anders & Frank, for appellant.

C. A. Carter and H. W. Hutton, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The question presented by this appeal is whether or not the intervener, Lorentzen, should be allowed to participate in the distribution of the proceeds of the sale of the schooner Wahlberg, he having been denied that right by the court below, and such proceeds having been by that court distributed to—First, those rendering services on board the schooner at the request of, or under contract with, her master; and, second, to those who furnished supplies for the schooner in this state, at the request of the master. The schooner was a domestic vessel, San Francisco being her home port.

By section 813 of the Code of Civil Procedure of California it is provided, among other things, as follows:

"All steamers, vessels, and boats are liable: (1) For services rendered on board at the request of or on contract with their respective owners, masters, agents, or consignees. (2) For supplies furnished in this state for their use at

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the request of their respective owners, masters, agents, or consignees. (3) For work done or materials furnished in this state for their construction, repairs, or equipment. * * * Demands for these several causes constitute liens upon all steamers, vessels, and boats, and have priority in their order herein enumerated and have preference over all other demands."

One James Crew was the managing owner of the schooner, and as such, on the 13th day of December, 1893, entered into a written agreement with the intervener, Lorentzen, who was a dealer in fur seal skins in San Francisco, whereby Crew agreed to send the schooner on a hunting and fishing voyage in the waters of the North Pacific Ocean, and to sell and deliver at San Francisco to Lorentzen all the fur seal skins obtained by the vessel during the season of 1894, Lorentzen binding himself to pay to Crew, as such managing owner, certain stipulated prices for the catch of the voyage delivered at San Francisco prior to December 31, 1894. Five days afterwards, to wit, on the 18th day of December, 1893, Lorentzen loaned Crew $2,800, taking therefor Crew's promissory note in that sum, together with a mortgage on the schooner as security therefor. The vessel sailed from San Francisco January 18, 1894, to the coast of Japan, with Crew as master, one Gus Schlehen as mate, a cook, a cabin boy, three hunters, and five seamen. By the terms of the agreement attached to the shipping articles, each and every officer and seaman who should well and truly perform the voyage and comply with the regulations and duties specified in the agreement, and commit no dishonest or unlawful act, should be "entitled to the payment of his share of the net proceeds of the voyage, pursuant to this agreement, as soon after the return of said schooner to San Francisco as the oil and other products of the voyage can be sold and the settlement adjusted by the owner or agent." The respective shares designated in the agreement were as follows: For the master, mate, and hunters, "as per agreement"; for the cook, $50 per month; for the cabin boy, 20 cents for each skin delivered on board the schooner (excluding grey pups); for each seaman, 20 cents for each skin delivered on board the schooner. While the vessel was in Japanese waters, the master was taken sick, and was landed at Hokodata, Japan, where he died, in July, 1894. The mate, Schlehen, thereupon took charge of the vessel as master, and took her to Yokohama. At Yokohama was the firm of Ahrens & Co., correspondents of the intervener, Lorentzen. On August 22, 1894, Ahrens & Co. cabled Lorentzen as follows: "Wahlberg arrived here yesterday. 191 seals. Please send instructions forthwith." To which Lorentzen replied, August 25, 1894, as follows: "Watch our interest. Send vessel and cargo here. Will pay crew." On the 30th of August, 1894, Ahrens & Co. cabled Lorentzen to the effect that the crew and hunters refused to proceed further, and that the schooner was in need of repairs, and was entirely without provisions, to which Lorentzen replied as follows: "Discharge [pay off] the crew according to agreement. Provide what is necessary. Engage a fresh crew." Ahrens & Co. accordingly paid to the master and crew of the schooner in Yokohama $1,413.22, and for supplies furnished and repairs to the schooner $774.09, and for expenses on the cargo of the schooner $165.18, and also for other

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advances, including cash paid to Capt. Crew and the expenses of his last illness, $741.94, aggregating $3,094.43, for which they drew on Lorentzen at San Francisco, which draft Lorentzen paid. From Yokohama there were sent to Lorentzen, at San Francisco, by steamer, 128 skins of the catch of the schooner, including the skins of 27 pups, for which Lorentzen realized $1,096; and upon return of the schooner to San Francisco, which was done by means of a new crew shipped at Yokohama, Lorentzen received from the schooner 108 skins, besides the skins of 85 pups, for which he realized $1,298, aggregating $2,394. The claim preferred by him by means of his intervention includes, in addition to the $3,094.43 paid on the draft of Ahrens & Co., the $2,800, loaned by Lorentzen to Crew on the 13th of December, 1893, aggregating $5,894.43, from which, in his account, he deducts the $2,394 realized by him for the skins, but which amount he claims the right to apply in part payment of the $2,800 loan, leaving the whole amount of the advances made in Yokohama by Ahrens & Co. for Lorentzen unpaid, and which the latter contends are preferred in character to the claims for supplies furnished in this state for the use of the schooner, upon the request of her master, prior to the commencement of the voyage.

There are several reasons why we think the court below was right in refusing to sustain this contention on the part of Lorentzen. It will be sufficient to state one or two. In the first place, he had not a particle of right to appropriate the proceeds of the skins to the payment of the money loaned by him to Crew on December 18, 1893. For that loan he took Crew's note, secured by a mortgage upon the schooner. By his contract of December 13, 1893, he agreed to buy the skins constituting the catch, and pay for them at certain stipulated rates. Out of that purchase money, expenses necessarily incurred on the voyage were properly payable; and, out of the net proceeds, the officers and men of the crew were entitled to their respective shares, in accordance with the agreement annexed to the shipping articles, for the services rendered by them on the voyage. If, therefore, it be conceded that the $1,413.22 paid by Lorentzen through Ahrens & Co., at Yokohama, to those of the crew who refused to proceed with the voyage, was properly paid, the proceeds of the skins are properly applicable to the reimbursement of that payment so far as necessary. But, according to the shipping articles, not one of the officers or men of the crew was entitled to pay for his services until the return of the schooner to her home port. They were not therefore entitled to be paid in Yokohama by anybody. By their refusal at that place to proceed with the voyage,—no excuse for such refusal appearing,—they forfeited their right to pay.

What has been said with respect to the application of the proceeds of the skins to the payment of the seamen's wages applies equally to the advances for supplies and repairs to the vessel made at Yokohama by Lorentzen, through Ahrens & Co., and to the advances there made for expenses on the schooner's cargo. Even if it be conceded to be shown that those advances were made on the

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credit of the vessel, the proceeds of the skins are properly applicable to their repayment. It results that the judgment must be affirmed, and it is so ordered.

(87 Fed. 369.)

FLORIDA C. & P. R. CO. v. BELL et al.

(Circuit Court of Appeals, Fifth Circuit. May 24, 1898.)

No. 599.

1. FEDERAL COURTS—JURISDICTION.
The federal courts have jurisdiction of an action to recover possession of lands which plaintiff claims by virtue of pre-emption under the laws of congress, and which defendant claims under an act of congress granting land to railroads, and where it appears that defendant resisted the plaintiff's pre-emption claim in the different stages of the prosecution thereof.

2. SAME.
The federal courts have jurisdiction of an action for mesne profits of land during the time between plaintiff's pre-emption entry and the issuance of the patent.

3. PLEADING—JURISDICTION.
The jurisdiction of a court does not depend on defendant's answer, and cannot be taken away by it.

4. PLEADING.
A plea that "plaintiff is a person non compos mentis and insane, and cannot maintain the said above-entitled suit," is not good.

In Error to the Circuit Court of the United States for the Southern District of Florida.

This was an action by William J. Bell and others against the Florida Central & Peninsular Railroad Company to recover possession of land and damages for the occupation and use thereof. There was a judgment for plaintiffs in the circuit court, and defendant brings error.

J. C. Cooper, W. W. Howe, W. B. Spencer, and C. P. Cocke, for plaintiff in error.

H. Bisbee, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

McCORMICK, Circuit Judge. This case is brought here on a writ of error to the circuit court of the United States for the Southern district of Florida. The declaration, filed in that court, December 29, 1896, is as follows:

"William J. Bell, John W. Bell, Frank A. Bell, who at and before the time this suit was commenced were citizens of the state of Texas, E. A. Bell, Matilda P. Feihe (née Bell), all heirs of and children of Louis Bell, late of Hillsborough county, state of Florida, deceased, George A. Bell and Simon Bell, heirs of and grandchildren of the said Louis Bell, and Antone Feihe, the husband of said Matilda P. Feihe, plaintiffs, by H. Bisbee and Padgett & Forrest, their attorneys, sue the Florida Central & Peninsular Railroad Company, a corporation organized and existing under the laws of Florida, the defendant, because the defendant heretofore, to wit, in the year 1890, took possession of,

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as its railroad bed and right of way, and built its railroad of four tracks across and through and upon, a strip and parcel of land, being a part of lot 8, section 24, township 29 south, of range 18 east, according to the surveys, maps, and plats thereof made by the government of the United States, and under and according to the laws of the said United States, which said lot 8 is in Hillsborough county, state of Florida, and in the said Southern district of Florida; which said strip and parcel of land, so taken as aforesaid by the defendant, and which the said defendant is in possession of and was in possession of at the time of the commencement of this suit, contains about seven acres, of the value of $30,000, to which the plaintiffs claim title; and the defendant has received the rents and profits of said land since the 1st day of December, 1889, of the yearly value of $4,000, and refuses to deliver the possession of the said land to the said plaintiffs, or to pay the rents or profits thereof. And the said plaintiffs allege that, in and by the construction of its said railroad upon, over, and through the said strip and parcel of land by the defendant, the defendant has dug up the said land in making its roadbed, and has taken away and removed the plaintiffs' fences thereon, and the soil and sand thereof, and other wrongs and trespasses and injuries to the said land and to the plaintiffs' possession and freehold committed, to the plaintiffs' damage of $10,000, exclusive of such rents and profits, which the defendant neglects and refuses to pay to the plaintiffs. And the plaintiffs allege that they claim title to the said land under and by virtue of a patent granted by the government of the United States of America to the said Louis Bell and his heirs, upon a pre-emption claim for said land under the laws of the United States, originally commenced and filed in the local land office of the United States of America at Gainesville, Florida, in 1883, and prosecuted by the heirs of the said Louis Bell and his heirs, the plaintiffs, in said land office, and upon appeal in the general land office of the government; and upon and from an appeal from the decision of the commissioner of the said general land office to the secretary of the interior of the United States the said heirs prosecuted the pre-emption claim, until, by the order and decision of the said secretary, the said patent was granted. And the plaintiffs allege that at various and sundry times during the said prosecution of the said pre-emption claim in the general land office aforesaid, and in the office of and before the said secretary, the defendant claimed, insisted, and contended that the plaintiffs were not, under any of the laws of the United States, entitled to have a patent to said land granted to the said Louis Bell and his heirs; and the said defendant, at the time of the commencement of this suit, claimed and insisted that the plaintiffs derived no title to the said land under and by virtue of the patent, and at said time claimed that under the laws of the United States of America, and especially under and by virtue of the first section of an act of congress entitled 'An act granting public lands in alternate sections to the states of Florida and Alabama, to aid in the construction of certain railroads in said states,' approved May 17, 1856, it was entitled and had the right to locate the route of its railroad and construct the same through the said lands, and to be in possession thereof, on the ground, among other grounds, that the said section 8 was a part of that tract of land, which constituted at one time a military reservation known as the 'Fort Brooke Military Reservation,' at Tampa, state of Florida. And the plaintiffs allege that after the passage of an act of congress entitled 'An act to provide for the disposal of abandoned and useless military reservations,' approved July 5, 1884, they contended for and claimed title to, and a patent to, the said parcel of land under and by virtue of the first proviso of the second section of the last-mentioned act of congress, both in the office of the said general land office and of the secretary of the interior, and the defendant appeared in both of the said offices by its counsel, and there claimed and contended, and at the commencement of this suit claimed and contended, that the plaintiffs were not entitled to a patent or title to said parcel of land under the said proviso of the said act of congress, and at the times aforesaid it claimed and insisted that it was entitled to locate the route of its railroad through said parcel of land, and to be in the possession thereof, under and by force of the third proviso of the aforesaid act of congress approved May 17, 1856; to the plaintiffs' damage of $40,000."

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To this declaration, the Florida Central & Peninsular Railroad Company, the plaintiff in error, on February 1, 1897, submitted the following plea:

"Now comes the defendant in the above-entitled cause, by John C. Cooper, its attorney, and for a plea to plaintiffs' declaration says it is not guilty as alleged in said declaration."

On February 5th the defendant moved the court for leave to submit additional pleas, as follows:

"(2) Now comes the defendant in the above-stated cause, and for a further plea, filed by leave of court, says that this honorable court has no jurisdiction, and did not have any jurisdiction at the time of the commencement of this suit, to entertain said suit; and defendant admits that before the commencement of this suit a patent was issued from the United States to Louis Bell and his heirs to all of lot 8, section 24, T. 29 S., R. 28 E., and that the plaintiffs claim title to said land described in the declaration as heirs of Louis Bell under said patent; and this defendant says it is not true that the defendant, at the time of the commencement of this suit, claimed and insisted that the plaintiffs derived no title to the said land under and by virtue of the said patent; and it is not true that at said time, or at any time since, the defendant claimed under the laws of the United States of America, or under an act of congress entitled 'An act granting public lands in alternate sections of the states of Florida and Alabama, to aid in the construction of certain railroads in said states,' approved May 17, 1856, or under an act of congress entitled 'An act to provide for the disposal and abandonment of useless military reservations,' approved July 5, 1884, or any other act of congress or law of the United States, any right, title, or interest in said land, or to locate the route of its railroad and construct the same through said land, but this defendant admits that now, and at the time of the commencement of this suit, it had no claim or title, and that it does not now, and did not at the time of the commencement of this suit, assert any claim or title, to said land under any act of congress or law of the United States. Wherefore the defendant says that this honorable court should no longer entertain jurisdiction of said suit, and said suit should be dismissed.

"(3) And for further plea defendant says that the plaintiff Matilda P. Feihe is a person non compos mentis and insane, and cannot maintain the said above-entitled suit.

"(4) And for a further plea defendant says that in December, 1889, and in January, 1890, it located and constructed its road and took possession of said right of way across and through said lot 8, section 24, township 29 south, of range 28 east, described in the plaintiffs' declaration, and laid its tracks thereon, and has continuously ever since maintained and operated said railroad thereon; and that on the 21st day of December, 1896, it filed its proceedings and petition in the circuit court for the Sixth judicial circuit in and for the county of Hillsborough, state of Florida, for the purpose of having valued and condemned the said land, and to acquire title under its right of eminent domain under the laws of the state of Florida, and that process was duly issued upon the said petition and proceedings as required by the laws of the state of Florida, directed to the plaintiffs in this suit as defendants to said proceeding, and the said process has been served upon said defendants, who have answered the said petition, and said proceedings are now pending and undisposed of in said court; and that in and by the said proceedings, and the judgment of said court thereof, this defendant will acquire the title of the plaintiffs to the said property, and the compensation will be awarded and paid thereunder to the plaintiffs for their right, title, and interest in the said property.

"(5) And for a further plea defendant says that theretofore, to wit, on the 21st day of January, 1890, the complainants, and those under whom they claim as heirs at law, filed their original bill in this honorable court, on the equity side, to enjoin the defendant from constructing and operating its railroad across said land; and that on the 2d day of January, 1890, his honor, Don A. Pardee, circuit judge, issued an order on said bill for a temporary injunc-

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tion against the defendant, but providing that, upon the defendant's filing its bond in the sum of $5,000, said injunction should be dissolved, or on the defendant's acquiring title under condemnation proceedings under the laws of the state of Florida; that said defendant did file the said bond, which was approved by the clerk of this court, through his deputy clerk at Tampa, Florida, and that on the 22d day of December, 1896, said plaintiffs in this suit, by leave of court, filed their supplemental bill in the said above-mentioned equity cause in this court, setting up the former proceedings on the original bill, and that they, as heirs at law of Louis Bell, had acquired a patent to said land from the United States, and praying for an injunction against the defendant's using or occupying any portion of said land, or from running or operating its said railroad upon said land, and that the defendant be decreed to have no right to condemn any part of said land under the laws of eminent domain of the state of Florida, and to enjoin the same, and for compensation to the complainants for the value of said land, and to remove said railroad from said lot, and for compensation for the use and occupation of said land by the defendant, and for waste and damage alleged to have been committed on said lot by the defendant. On February 1, 1897, this defendant filed its answer to the said supplemental bill, setting up its defenses thereto, and also alleging that it had not commenced proceedings in the circuit court of the Sixth judicial circuit, Hillsborough county, state of Florida, for the purpose of condemning said property under the laws of eminent domain of the state of Florida; and that the said equity cause involves the title to the same land, and in all respects the same subject-matter and the same relief, as this suit, and said equity cause is still pending and prosecuted by the complainants. Wherefore defendant says the plaintiffs ought not to maintain this suit against this defendant."

Thereupon the court made this order:

"This cause coming on to be heard upon the motion of the defendant for leave to file additional pleas, * * * and it having been fully heard and considered, and it appearing that none of said pleas constitute a good defense to said action that could not as well be shown under the general plea of not guilty, it is ordered that said motion to file additional pleas be denied. * * *"

On March 5, 1897, the plaintiff in error presented its motion as follows:

"Now comes the defendant in the above cause on this day and moves the court to dismiss said cause, for the reason that there is nothing upon the face of the declaration to show that this court has jurisdiction to hear and determine the said cause."

—On which the court made its order, to wit:

"On consideration of this motion to dismiss, it is ordered in open court, March 11, 1897, that said motion be dismissed."

Thereupon the parties filed in open court a written stipulation in these words:

"Now come the above-named parties, plaintiffs and defendant, by their respective counsel, and hereby agree to waive a jury, and that the action may be tried by the court without a jury."

On March 23, 1897, the circuit court made its findings, as follows:

"This cause coming on for a hearing by the court without a jury, a jury having been waived herein by a stipulation by the parties in writing, and having been fully heard by the introduction of documentary evidence and the testimony of witnesses, and being duly considered, the court finds, as matters of law, that the plaintiffs are entitled to the possession of, and have a fee simple title in and to, the land hereinafter described, and the undivided interests of the plaintiffs in and to the said land are as follows, to wit: William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell, and Matilda P. Feihe (née Bell) have and own each one undivided sixth part and interest in the

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said land; and that George A. Bell and Simon Bell have and own each one undivided twelfth part and interest in said land. And the court further finds, as a matter of law, that the plaintiffs have at all times within seven years next before the commencement of this action been entitled to the exclusive possession of said tract or lot of land hereinafter described, and are entitled to such amount in the form of judgment for damages and mesne profits as will fully compensate them for any damages that have been sustained, and loss of rents and profits which have been caused, by the unlawful trespass and possession of the defendant herein. And the court further finds, as a matter of fact, that in damages and in loss of rents and profits the plaintiffs have been injured and damaged to the extent of $1,955. And the court further finds, as a mixed matter of law and fact, for the plaintiffs, and that they should have judgment for the shares and portions as found in the first finding, to wit: William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell, Matilda P. Feihe (née Bell), each one-sixth part, and George A. Bell and Simon Bell each one-twelfth part, in fee simple interest in and to the following described lot or tract of land, to wit: A strip and parcel of land, being a part of lot 8, section 24, township 29 south, range 18 east, of the meridian of Tallahassee, state of Florida and county of Hillsborough, known and described as follows, to wit: Beginning at a point in the east boundary line of said lot 8, at a distance of 75 feet in a south direction from the northeast corner of said lot,—running southwesterly parallel to the northwesterly boundary line of said lot, to the western boundary line of said lot 8, fourteen hundred and twenty-four feet; thence south, on said western boundary line of, 75 feet; thence northeasterly, on a line parallel to said northwestern boundary line of said lot, to the eastern boundary line of said lot; thence north, along said eastern boundary line 75 feet, to the place of beginning. And the court further assesses their damages for injury, use, and occupation while said land has been held and occupied by said defendant company at $1,955, for which judgment should be given."

—And on the same day entered judgment in favor of the plaintiffs below (defendants in error here) to the effect that they "receive and recover from the defendant, the Florida Central & Peninsular Railroad Company, the sum of nineteen hundred and fifty-four dollars, as well as ——— for costs in this behalf; and it is further considered that said plaintiffs have a fee-simple title in and to the lands and premises described as follows, to-wit: [Giving a description of the land.]"

The assignment of errors embraces 12 specifications. After a careful examination and consideration of the record and the briefs and oral arguments of counsel submitted, we deem it necessary to notice only the fourth ground of error suggested by the plaintiff in error, that the court below refused to grant the defendant's motion to dismiss for want of jurisdiction. It is clear to us that this assignment of error is not well taken. The plaintiffs' whole suit in the circuit court rested upon the different statutes of the United States giving their ancestor a right to pre-empt the land for which their action is brought. Moreover, their action was not for a recovery of the land alone, nor for the establishment of their title to it alone, but an important part of their action, if not the chief part, so far as it invoked litigation, was the recovery of damages for the occupation and use of the land for the years prior to the issuance of the patent. That part of the plaintiffs' action the defendant below did not admit, but, on the contrary, zealously denied, and still stoutly contests, and makes that contest the foundation of four specifications of error embraced in its assignment.

There is no effort in this case to found the jurisdiction of the court

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on the diverse citizenship of the parties. There is nothing in the record to indicate that the judge of the circuit court entertained jurisdiction of the case on that ground. The declaration shows that, in the pre-emption claim by the ancestor of the defendants in error to the land involved, the claim was stoutly resisted by the plaintiff in error in the different stages of the prosecution thereof and before the different officers of the land department. It shows that under a named act of congress (approved May 17, 1856) the defendant claimed the right to occupy the land in question in the manner that it was occupying it, without accountability to the defendants in error. It is difficult to perceive how the case made in the circuit court by the defendants in error could be determined by that court without its construing the acts of congress with reference to entries thereby authorized to be made on public lands, conditioned as the land in question was at the time of Louis Bell's entry; and the fact that there had been a long-continued contest in reference thereto in the different offices, and before the different officers, of the land department, would seem sufficient to show that there might be a construction of the public laws relating to that particular part of the public domain which would uphold the right of the heirs of Louis Bell, and support their patent thereto, and also that there might be a construction of the laws of congress relating thereto which would defeat, as the defendant had long attempted to defeat, the right of this pre-emptor and his heirs. So that, independently of the claim for mesne profits for the time transpiring between the pre-emption entry and the issuance of the patent, it is clear that the issues made by the declaration presented a case within the jurisdiction of the circuit court. Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. 1228; Railway Co. v. Ziegler, 167 U. S. 65, 17 Sup. Ct. 728; Pierce v. Molliken, 78 Fed. 196. There is even less room to doubt that the circuit court has jurisdiction of the case for the recovery of mesne profits accruing before the issuance of the patent. Evans v. Durango Land & Coal Co., 25 C. C. A. 531, 80 Fed. 433.

We think the court did not err in refusing the motion of the plaintiff in error for leave to file the additional pleas submitted. So far as these pleas were intended to affect the jurisdiction of the court, they are clearly bad, because the jurisdiction of the court did not depend upon the defendant's answer, and could not be taken away by it. Osborn v. Bank, 9 Wheat. 826.

As to the plea which sought to question the capacity of one of the plaintiffs to sue, it came too late, and, if it had been presented in time, it was clearly not good as pleaded. Dudgeon v. Watson, 23 Fed. 161.

As the record shows no error in the proceedings in the circuit court for which, in our opinion, the judgment of that court should be reversed, it is affirmed.

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(87 Fed. 392.)

LOW et al. v. BLACKFORD et al.

(Circuit Court of Appeals, Fourth Circuit. May 3, 1898.)

No. 246.

1. MORTGAGES—PROVISIONS BINDING UPON BONDHOLDERS.
A mortgage and the bonds and coupons secured thereby are to be construed as one contract, and provisions in the mortgage as to the method of distribution of the proceeds in case of foreclosure sale, although not found in the bonds, will bind the bondholders where there is nothing in the bonds inconsistent therewith.

2. SAME—FORECLOSURE SALE—DISCRETION OF COURT.
Where a mortgage is foreclosed in equity, the court is not bound to decree a sale in strict accordance with the terms prescribed in the mortgage for the execution of the power of sale therein contained, but should exercise a sound discretion, having due regard to the interest of all parties.

3. SAME—METHOD OF SALE—APPORTIONMENT OF PROCEEDS.
Where a single mortgage, given by a railway company to secure three series of bonds, each of which constituted a first lien upon one of the three divisions of the road, and a second lien upon the other two, was foreclosed in equity, *held*, that the three divisions should not be sold separately, nor should the property be offered both in separate divisions and as an entirety, and the most advantageous bid accepted; but the entire property should be sold as an entirety, and the proceeds apportioned among the bondholders of the three classes according to the relative value of the three divisions as found from the evidence. 82 Fed. 344, affirmed.
Purnell, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the Eastern District of North Carolina.

Charles Steele, for appellants.
Cowen, Cross & Bond, for appellees Wm. H. Blackford and others.
Turner, McClure & Rolston, for appellee Farmers' Loan & Trust Co.
R. O. Burton and Watson & Buxton, for appellee John W. Fries.
George Rountree, for appellee W. A. Lash.

Before GOFF, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

GOFF, Circuit Judge. The Farmers' Loan & Trust Company, trustee, instituted this suit in the circuit court of the United States for the Eastern district of North Carolina in March, 1894, for the purpose of foreclosing the first mortgage, dated June 1, 1886, executed by the Cape Fear & Yadkin Valley Railroad Company. The Mercantile Trust Company of Baltimore, the trustee in the second mortgage, known as the "consolidated mortgage," dated October 1, 1889, was made a party defendant, and subsequently, when it resigned its trust, William A. Lash was substituted as trustee under the mortgage and as defendant in the suit. A cross bill was filed by said Lash as trustee of the second or consolidated mortgage, in which he prayed that it also might be foreclosed. The first mortgage covers all of the railroad lines except the branches, while the second or consolidated mortgage embraces all of the lines in the first, and also includes the

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branch lines. The first mortgage is given to secure three separate series of bonds, designated, respectively, as "Series A," "Series B," and "Series C" bonds. Each series of bonds has a first lien upon a certain designated division of the railroad and a second lien upon the other two divisions. The main line from Wilmington to Mt. Airy is 248¼ miles long. Division A is that portion of the road which lies between Greensboro and Fayetteville and Fayetteville and the South Carolina line, about 144 miles in all, of which 46¾ miles is made up of the line from Fayetteville to the South Carolina line. On this division Series A bonds are a first lien, and they are also a lien in common with Series C bonds, but subordinate to Series B bonds, upon that portion of the road situated between Greensboro and Mt. Airy, and also a lien in common with Series B bonds, but subordinate to Series C bonds, on that portion of the road between Fayetteville and Wilmington. Division B is that portion of the road situated between Greensboro and Mt. Airy, about 70 miles in length. On this division Series B bonds are a first lien, and they are also a lien in common with Series C bonds, but subordinate to Series A bonds, upon that portion of the road which lies between Greensboro and Fayetteville and Fayetteville and the South Carolina line, and also a lien in common with Series A bonds, but subordinate to Series C bonds, on that portion of the road between Fayetteville and Wilmington. Division C is that portion of the road between Fayetteville and Wilmington, about 81 miles in length. On this division Series C bonds are a first lien, and they are also a lien in common with Series B bonds, but subordinate to Series A bonds, on that portion which lies between Greensboro and Fayetteville and Fayetteville and the South Carolina line, and also a lien in common with Series A bonds, but subordinate to Series B bonds, on that portion of the road located between Greensboro and Mt. Airy.

The Cape Fear & Yadkin Valley Railway Company is the successor to the Western Railroad Company, a corporation created by the act of December 24, 1852, passed by the general assembly of North Carolina. That portion of the Cape Fear & Yadkin Valley Railway now known as "Division A" had been constructed and operated by the Western Railroad Company. Those parts of the road now called Divisions B and C were built by the Cape Fear & Yadkin Valley Railway Company, whose corporate existence dates from March 1, 1879. It also constructed a number of branch lines in aid of both its local and through business, now known as the "Factory Branch," the "Madison Branch," the "Granite Branch," the "Furnace Branch," the "Aldrich Quarry Branch," and the "Buff Quarry Branch." The South Carolina Pacific Railway, which is 10½ miles long, running from Bennettsville to the North Carolina line, has been leased, and is now operated by the Cape Fear & Yadkin Valley Railroad Company. On the day that the bill was filed in the court below, John Gill was appointed receiver of the Cape Fear & Yadkin Valley Railway Company, and he has been in the custody and control of all its property, under the orders of the court, from that date. On the 2d day of May, 1894, the answer of said railway company was filed, in which all of the allegations of the bill were admitted to be true.

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William A. Lash, the substituted trustee under the consolidated mortgage of October 1, 1889, filed his answer to the bill on the 28th day of September, 1894. The receiver of the North State & Improvement Company filed his answer on the 28th of September, 1894, by which it appears that said company is the owner of $1,608,000 par value of the stock of the Cape Fear & Yadkin Valley Railway Company, and also of $1,848,000 of the bonds of said railway company executed on the 1st day of October, 1889, and secured by the second or consolidated mortgage. It is claimed by the receiver that the bonds so held are secured by a first lien upon several of the branch lines of the railroad company, and by a second lien upon all the property of said company, subject only to the lien of the first mortgage. The appellants Charles Adolphe Low, George F. Baker, and William E. Strong, claiming to be a committee of Series A bondholders, asked permission of the court below to intervene, and their request was granted on the 20th of December, 1895. These petitioners were known as the "New York Committee." The appellees William H. Blackford, William H. Perot, John A. Tompkins, Frank T. Redwood, Basil B. Gordon, and J. W. Middendorf, claiming to be a committee of holders of the bonds of the three different series, asked like permission to intervene, and their petition was also favorably passed upon by the court. They are called the "Baltimore Committee." The contention of the New York committee was and is that the railroad should be offered for sale, both by divisions and as an entirety, and the most advantageous offer accepted; while the claim of the Baltimore committee was and is that it should be sold as an entirety. The case, having been duly matured, came on to be finally heard, when the court below directed that the Cape Fear & Yadkin Valley Railway, it appearing that it was in default and insolvent, should be sold at public auction as an entirety, and that the proceeds of sale should be apportioned among the bonds as follows: To Division A, 55 per cent.; to Division B, 19 per cent.; to Division C, 19.4 per cent.; and to the bonds having the first lien on the branches, 6.6 per cent. This method of division was found by the court below from the master's report and from the testimony of a number of experts filed therewith, who had carefully examined the road, its reports, receipts, and disbursements. So far as the questions raised on this appeal are concerned, it is not deemed necessary to refer to the other provisions of the decree of sale, which bears date March 31, 1897, and from which the appeal we are now considering is prosecuted.

The first assignment of error is in these words:

"Because in and by said decree of March 31, 1897, the proceeds of the sale of the premises covered by the first mortgage of June 1, 1886, therein directed, are ordered to be distributed first to the payment of the coupon interest of the several series of bonds mentioned in the said decree in preference and priority to the principal of said bonds."

The part of the decree on which this assignment is based, provided that the portion of the proceeds of sale allotted to Series A bonds should be distributed as follows:

"First, to the payment of the coupon interest, which may be due on each of said outstanding Series A bonds (including interest on said coupons), if said

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amount be sufficient to pay the same, or, if not sufficient, then to the payment of the same pro rata; and after the full and complete payment of said coupon interest as aforesaid, then to the payment of the principal of said Series A bonds, if sufficient to pay the same in full, and, if not sufficient to pay the same in full, then to the payment of the same pro rata."

The decree also in like manner provides for the distribution of the allotment made to the Series B bonds and to the Series C bonds, directing in each case that the principal of the bonds shall be paid only after the coupon interest, with the interest thereon, has been paid in full. The mortgage provides that the proceeds of the trust fund in case of a sale of the railroad shall be applied first to the payment of interest, and then to the payment of the principal of the bonds. No such provision is found in the recitals of the bonds, and the claim of the appellants in this regard is that the terms of the bonds must control, and that they are not to be affected by inconsistent statements found in the mortgage. As a matter of fact, is there anything found in the mortgage inconsistent with or contradictory of the provisions of the bonds? We think not. The provisions found in the mortgage, not included in the bonds, are not contradictory of the latter, but supplemental thereto. And it is well established that in cases of this character the bonds, coupons, and mortgages are to be read together, and construed as constituting one contract; and if the bond refers to the mortgage, as in this case, then the holder of the bond will be presumed to be aware of the terms of the mortgage. Thomp. Corp. §§ 6075, 6110; Manufacturing Co. v. Howard, 28 Fed. 741; Gregory v. Marks, 8 Biss. 44, Fed. Cas. No. 5,802; Stanton v. Railroad Co., 2 Woods, 523, Fed. Cas. No. 13,297; Skiddy v. Railroad Co., 3 Hughes, 320, Fed. Cas. No. 12,922; Caylus v. Railroad Co., 10 Hun, 295, affirmed 76 N. Y. 609; McMurray v. Moran, 134 U. S. 150, 10 Sup. Ct. 427. Each of the bonds secured by the mortgage referred to in this case contains the following, differing only as to the series to which they respectively belong:

"This bond is one of Series A, issued under, secured by, and subject to all of the provisions of a first mortgage executed by the said railway company to the said the Farmers' Loan and Trust Company, bearing even date herewith, to which said mortgage reference is hereby made for the more detailed provisions thereof."

This provision of the foreclosure decree is founded on the direct and positive terms of the mortgage itself, which are usually adopted by the courts in cases where the trust or contract provides for it. It is not uncommon in such decrees to direct that the proceeds of foreclosure shall be applied to the payment of coupons which matured before a general default in preference to the bonds from which they were taken, if there is nothing in the mortgage requiring a distribution in another and special manner. If the deed of trust or mortgage provides that the interest coupons must be paid before the principal of the bonds, then the decree will be so drawn. Stevens v. Railroad Co., 13 Blatchf. 412, Fed. Cas. No. 13,406; Cutting v. Tavares, 23 U. S. App. 363, 9 C. C. A. 401, and 61 Fed. 150; Burke v. Short, 24 C. C. A. 422, 79 Fed. 6; Railroad Co. v. Fosdick, 106 U. S. 48, 1 Sup. Ct. 10. It is, therefore, well established that the manner of distributing funds realized from the sale of property under fore-

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closure proceedings is to be determined from the terms of the mortgage. In cases where it has been held that the proceeds shall be divided ratably between the bonds and the past-due coupons, reference has been made to the mortgage to show that no requirement to the contrary is contained therein. Duncan v. Railroad Co., 3 Woods, 567, Fed. Cas. No. 4,138; Ketchum v. Duncan, 96 U. S. 659, 671; Dunham v. Railway Co., 1 Wall. 254. The case of Duncan v. Railroad Co., above referred to, and relied upon by counsel for appellants, is not in conflict with the views we now express, although it was there held that the overdue coupons were not entitled to priority in payment over the principal of the bonds. It is clear that the court reached the conclusion announced in that case because the mortgage contained no provision giving preference to the interest coupons. It may be well to quote in this connection the terms of the mortgage relating to this matter, which are as follows:

"And after deducting from the proceeds of such sale proper allowances for all expenses thereof, including attorney and counsel fees, and all other expenses which may have been by it incurred, as well as reasonable compensation for its own services, it [the trustee] shall apply the residue of the proceeds of sale to the payment, first, of the interest due on the said bonds outstanding secured, or intended to be secured, hereby, and, secondly, of the principal of said bonds in full, if the said purchase money, after deducting the expenses above mentioned, be sufficient; but, if not, then pro rata."

We find no error in the decree complained of, so far as the questions raised by the first assignment of error are concerned, and we now proceed to the consideration of the next, which is in the following words:

"Because the said decree of March 31, 1897, directs the sale of the mortgaged premises therein described only as a single parcel and an entirety, and not in divisions, and further directs that the proceeds of such sale be divided among the holders of the several series of bonds therein mentioned according to the percentages fixed by the court and specified in said decree."

This brings in review by this court not only the conclusion reached by the court below to sell the railroad as an entirety, but also the relative value of the different liens as found and established by that court. Is the contention of the appellants that under the terms of the mortgage they are, as holders of bonds secured thereby, entitled to a separate sale of each division of the road, or to have it offered for sale as an entirety and then in divisions, according to "the double method of sale," well founded? The first mortgage was made to secure three different series of bonds. That it does so, and that it is a valid mortgage, we have no doubt. Two mortgages were authorized by the stockholders at a meeting of the same held May 6, 1886, the details to be arranged by the board of directors, covering the entire property and franchises of the company. The first mortgage covering the property owned by the company in existence at the date of the same was to secure bonds to the amount of $10,000 per mile upon the road then constructed and to be thereafter constructed, and the bonds were to be divided into three series, the liens of the same to attach as the board of directors should determine. The second mortgage was also to be upon the entire property,—an income mortgage to the amount of $5,000 per mile. The board of directors,

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at their meeting on May 6, 1886, passed, among others, the following resolutions:

"First. That this company make and execute a first mortgage upon its franchises and entire property, as is more particularly hereinafter described, to the Farmers' Loan and Trust Company of New York, and issue bonds thereunder to an amount not exceeding ten thousand dollars per mile of completed road, which bonds shall be of the denomination of one thousand dollars each, payable in gold coin of the United States of America, and shall be of three series, as is more particularly hereinafter specified. They shall bear date the first day of June, one thousand eight hundred and eighty-six, and shall bear interest from the first day of June, one thousand eight hundred and eighty-six, at the rate of six per centum per annum, payable semiannually at the agency of this company in the city of New York on the first days of June and December in each and every year as evidenced by the interest coupons thereto attached, and shall become due and payable on the first day of June, one thousand nine hundred and sixteen.

"Resolved, secondly, that the property to be conveyed by the said mortgage shall be all and singular the railroad of said company between the Virginia line from the point near Mt. Airy, where the road now being constructed shall intersect that line, via Greensboro and Fayetteville to the South Carolina line, where the road now intersects that line, and also the road from Fayetteville to Wilmington to be hereafter built, now owned or hereafter acquired, together with all sidings, station houses, real estate along the line herein described, and all equipment, tolls, and income thereof, all the corporate rights and franchises of said company, and all other real and personal property to it belonging and appurtenant to the line here described, whether now owned or hereafter acquired; and this mortgage shall be in trust for the benefit and security of the holders of the bonds issued hereunder without preference, priority, or distinction as to the date or time of issue, so that each of such bonds shall have the same security hereunder as though they had all been executed and delivered simultaneously: provided, however, that the said bonds be divided into three series of bonds, that is to say, Series A bonds, Series B bonds, and Series C bonds, and they shall attach as liens upon the property hereby mortgaged in the following manner, that is to say: Series A bonds shall be a first lien on that portion of the railroad which lies between Greensboro and Fayetteville and Fayetteville and the South Carolina line, together with all station houses, sidings, and other property of whatever nature appurtenant thereto; and a lien in common with Series C bonds, but subordinate to Series B bonds, upon that portion of the road now being constructed between Greensboro and the Virginia line via Mt. Airy, together with the property appurtenant thereto; and also a lien in common with Series B bonds, but subordinate to Series C bonds, on that portion of the road between Fayetteville and Wilmington, when the same shall be constructed, together with the property appurtenant thereto. Series B bonds shall be a first lien upon that portion of the road which is now being constructed between Greensboro and the Virginia line via Mt. Airy, together with all station houses, sidings, and other property of whatever nature appurtenant thereto; and a lien in common with Series C bonds, but subordinate to Series A bonds, upon that portion of the road which lies between Greensboro and Fayetteville and Fayetteville and the South Carolina line, together with the property appurtenant thereto; and also lien in common with Series A bonds, but subordinate to Series C bonds, on that portion of the road between Fayetteville and Wilmington, when the same shall be constructed, together with the property appurtenant thereto. Series C bonds shall be a first lien upon that portion of the road between Fayetteville and Wilmington, when the same shall be constructed, together with all station houses, sidings, and other property of whatever nature appurtenant thereto; and a lien in common with Series B bonds, but subordinate to Series A bonds, on that portion of the road which lies between Greensboro and Fayetteville and Fayetteville and the South Carolina line, together with the property appurtenant thereto; and a lien in common with Series A bonds, but subordinate to Series B bonds, on that portion of the road which is now being constructed between Greensboro and the Virginia line via Mt. Airy, together with the property appurtenant thereto. And in

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case of a default and foreclosure as is hereinafter provided for, all rolling stock and movable and other property which belongs to the road as an entirety, and is not specially appurtenant to any one of the three divisions of the road hereinbefore made, shall be apportioned among the said three series of bonds in proportion to the amount of such bonds as may be outstanding at the time of such default and foreclosure."

This action of the stockholders and directors was copied into and made part of the mortgage. Other resolutions of the directors, also included in the mortgage, fixed the form of the bonds, and divided them into the series before described. The mortgage then grants in trust the entire railroad from Greensboro to Fayetteville, and from Fayetteville to the boundary line between North Carolina and South Carolina, and from Fayetteville to Wilmington, and also the road then being constructed from Greensboro to the boundary line between North Carolina and Virginia. It then provides for a sale at public auction, by the trustee, of the mortgaged property, in case of default in the payment of interest, and specifically directs the mode of procedure of said sale in the following language:

"The said party of the second part shall, in case of such default as is referred to hereinbefore in this article, upon the written application of holders of one-tenth of the bonds hereby secured or intended to be secured, declare the whole principal sum of all the bonds secured or intended to be secured by this mortgage to be due and payable, whereupon the whole principal sum of each and all of said bonds then outstanding shall forthwith be due and payable, notwithstanding that the time therein limited for the payment thereof may not then have elapsed; and the said party of the second part shall, in that case, upon like security and indemnity, proceed, with or without taking possession, to sell and dispose of at public sale all and singular the said railroad, estate, real and personal, corporate rights, franchises, and premises hereby mortgaged, or agreed or intended so to be, to the highest bidder offering the same first as an entirety; and, in case no acceptable bidder is forthcoming for the said property as an entirety, then the said trustee shall proceed to sell separately the three divisions of the road hereinbefore made, and upon which the several series of bonds are hereby made or intended to be made first liens."

This special direction was to the trustee, and was limited to the sale to be made under the provision of the mortgage last quoted. But the trustee did not act under this clause. The holders of one-tenth of the bonds secured by the mortgage did not ask it to proceed under the same, and therefore, after the default by the railroad company, it sought the aid of a court of equity, filing therein the foreclosure bill usual in such cases. Surely, it will not be seriously contended that this special instruction to the trustee for his guidance in a contingency that, in fact, never happened, is also to be considered as a direction to a court of equity, called upon years after to dispose of the property in such manner as will best protect the interests of all the parties, and guard the equities presented by the conflicting claims that have their existence from causes originating since the mortgage was executed. There is no "iron rule" upon this subject, and while the general practice is to follow as closely as may be proper the mode of procedure desired by the parties, and as may be set forth in the mortgage, yet still the court must, in its discretion, determine from the facts of each case the manner of sale that will subserve all interests, produce the best results for all concerned, and not enhance the

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value of one class of securities involved at the cost of another which is equally entitled to its care and protection.

Appellants' claim that the mode of sale provided for in the mortgage is to be exclusive of all others has not been favorably received by the courts, and has met with the disapproval of the supreme court of the United States, which, speaking by Mr. Justice Brown in the case of Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 137, 143, 11 Sup. Ct. 512, 514, said:

"This clause, however, is open to the objection of attempting to provide against a remedy in the ordinary course of judicial proceedings, and oust the jurisdiction of the courts, which, as is settled by the uniform current of authority, cannot be done. Hope v. Society, 4 Ch. Div. 327; Edwards v. Insurance Soc., 1 Q. B. Div. 563; Horton v. Sayer, 4 Hurl. & N. 643; Scott v. Avery, 8 Exch. 487; s. c. 5 H. L. Cas. 811; Thompson v. Charnock, 8 Term R. 139; Mitchell v. Harris, 2 Ves. Jr. 129; Tobey v. Bristol Co., 3 Story, 800, Fed. Cas. No. 14,065; Noyes v. Marsh, 123 Mass. 286; King v. Howard, 27 Mo. 21; Conner v. Drake, 1 Ohio St. 166; Trott v. Insurance Co., 1 Cliff. 439, Fed. Cas. No. 14,189; 2 Story, Eq. Jur. § 1457."

It is true that the mortgage in that case referred to provided that the method of sale set out in it should be exclusive of all others, but still the reasoning of the court and the authorities cited sustain the conclusion that the parties to a contract cannot, by its terms, deprive a court of equity of its right, in the due course of its proceedings, to adopt such plans concerning the sale of property as the peculiar circumstances of the case before it shall suggest to be proper for the protection of the interests of all the parties. Again, the supreme court in the case of Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co., 137 U. S. 171, 192, 11 Sup. Ct. 67, said, referring to a similar provision:

"There was nothing in the mortgages which took away the inherent right of resort to the courts, and this clause did not impart what existed without it; but its insertion, evidently out of abundant caution, made it perfectly clear that the provisions relied on by appellants did not apply to foreclosure by bill in equity, but to the cumulative remedy specified. It is easy to see why taking possession and selling, without intervention of the court should be guarded against, and the trustee not be required or allowed to proceed in that summary manner except on the request of a certain percentage of the holders of the bonds. Such proceedings might result in injury, which could not be predicated of those regularly taken in a court of equity. Arbitrary procedure by the trustee was not deemed desirable, in view of the interests of both mortgagor and the bondholders as a class, while each would find the protection to which it might be entitled at the hands of the court. Mercantile Trust Co. v. Missouri, K. & T. Ry. Co., 36 Fed. 221."

It is clear that the trustee in such a mortgage may waive the cumulative remedy provided in it, and apply to a judicial tribunal for a foreclosure; and frequently it is for the interest of all concerned that he should do so. If the court is resorted to, the procedure must be according to the established rules of law, and the chancellor is not bound to direct a sale in strict accordance with the terms of the mortgage, but should exercise a sound discretion, having due regard for the rights of the debtor and of all the creditors, respectively. Undoubtedly, there are cases where it will be entirely just and equitable to adopt in the decree of foreclosure the plan of sale suggested by the mortgage, but certainly it will not be error going to the validity

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of the decree not to do so if the rights of all the parties have been fully recognized and duly guarded.

The court below not being compelled by the terms of the mortgage to sell the railroad by divisions, it remains yet to be ascertained whether or not the direction that it be sold as an entirety was, under the circumstances of this case, the proper exercise of judicial discretion. A connected railroad, one of the length, character, and importance of the Cape Fear & Yadkin Valley, involving as it does such large sums of money to its bondholders and its stockholders, and in which the people of the state to which it owes its existence are so deeply interested, should, if at all practicable, be kept together as one system, and sold as an entirety. The onus is on those who insist that it should be disrupted and sold in parcels to show the necessity for it, and to make it clear to a court of equity that good conscience and fair dealing demands it. Have the appellants succeeded in doing this? Giving due consideration to the facts they have marshaled, and to the arguments submitted in support thereof, we are forced to answer the question propounded in the negative. In proceedings of this character courts will, if at all practicable, regard the railroad as an entirety, will decree it to be sold as such, and will prevent its severance into parcels, even though it may be subject to partial mortgages. Muller v. Dows, 94 U. S. 449; Bank v. Shedd, 121 U. S. 74, 87, 7 Sup. Ct. 807; Railroad Co. v. Lewton, 20 Ohio St. 401; Compton v. Railroad Co., 31 U. S. App. 486, 597, 15 C. C. A. 397, and 68 Fed. 263, 327. We quote with approval the following portion of the opinion of the court below, filed by Judge Simonton, in disposing of the particular point we are now considering:

"The proceedings for foreclosure having been instituted in this court, and a receiver having been appointed, and the time having arrived for a final decree, the first question which is met at the threshold is, how shall the road be sold? In divisions, or as an entirety? How shall the proceeds of sale be apportioned among the several classes of bonds in case, as is more than probable, a sum sufficient to pay the entire sum due, with expenses, be not realized from the sale? This railway company derives all its powers and privileges from the state which created it, and the bondholders enjoy the security of the mortgage, because the act of the legislature granted this power to the railway company. The purpose and intent of the state was to secure an entire line of railway from its principal seaport to the Virginia line. It granted the franchise to the company as an entirety,—one indivisible franchise, granted for the purpose of constructing and continuing an entire continuous line of road. The mortgage is also a single instrument of an entire line intended to secure interest of all bonds and then the principal, giving to each of them as part of its security the franchise of the whole line and an interest in the entire road and its property. Over the action of the trustee, each bond, without distinction, has an equal voice with every other bond. The trustee must see to it that the interest on every bond is paid. One-tenth of all the bonds, without distinction, can secure a declaration that all of the bonds are payable at once, and can require the trustee to enter and take possession of the whole mortgaged property. Every part of the railway property is dependent upon and connected with the others, and this interdependence constitutes a part of the value of each of its several parts. Division B, for instance, has a value in its bed, iron, cross-ties, stations, etc. Besides all these, it has a clearly recognized value, because it is a part of a continuous line operated by one set of agents from its western terminus to the sea. The same intrinsic and incidental value exists in each division. If, therefore, the property were offered for sale at auction in separate divisions, it could —probably would—result in a disruption of the entire system, against the

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purpose of, and defeating the ends sought by, the state, for which the corporation was created, and to which it owes its existence and its powers; will be inconsistent with the general tenor of the mortgage itself; and will utterly destroy an important incident in the value of each division. Besides this, during the operation of this railway as a whole system, it has become possessed of certain property rights secured for the benefit of the whole system. These are, the lease of the South Carolina Pacific, connecting at the South Carolina line, and extending to Bennettsville, South Carolina,—a valuable feeder. If the road be sold in divisions, this connection would be valuable to, and could be purchased by, the purchaser of Division A only, at its own price. From time to time branch roads have been constructed, connected with Division A and with Division B. They are valuable because of this connection, because of this connection only, and are only valuable to the purchaser of the division with which they are respectively connected, who will get each of them at his own price. The franchise cannot be divided. A sale by division would destroy it entirely. It is true that under the statute law of North Carolina (section 1936 of the Code of North Carolina) the purchasers of any railroad can form a new corporation, and, if the divisions are sold separately, each set of purchasers can do this. But the present franchise for a line continuous from the northwestern boundary of the state to the sea would be absolutely lost, unless the road and its property be sold as an entirety. In that case only could the purchasers organize a corporation with this franchise. The rolling stock is used on the whole system. It is not needed by any division separate from the whole. A sale by division would greatly impair its value. Every bond is entitled to its share of the value of each of these items of value. It would be unjust, it could almost be said would impair the obligation of a contract, to deprive any of them of this incident of value. It would, perhaps, be improper, at least premature, to say that this railroad property could not or should not, under any circumstances, be sold except as an entirety; not in divisions. But this course—a sale of the property as a whole—should not be abandoned, if abandoned at all, except as a last resort, after it has been demonstrated that it is not practicable, due regard being had to the rights of the bondholders of each or any class. For the present, under the stress of the reasons given, it is best to exhaust the effort to sell the whole property as an entirety. But if the property be sold as a whole, we are met by a grave problem. How shall the proceeds be apportioned? There is a marked difference in the value of the bonds on each division, and of the real value of each division. Division A meets at Greensboro, one of its termini, the Southern Railway, and at Fayetteville it crosses the Atlantic Coast line. At its other terminus it meets a valuable feeder, the South Carolina Pacific. Division B has fewer advantages, and is less valuable. So with Division C still less. This difference must be ascertained, and the proceeds of sale apportioned. Ordinarily putting up property at auction in open market is the best test of value. This, however, is not the case with railroad property under mortgage. The holders of the bonds control the sale, and can make the price bid suit their views. This is almost the universal experience. The South Carolina Railway Company, at the end of a foreclosure suit involving questions of liens of five orders of priority, was put up for sale, and was purchased by a controlling syndicate of first consolidated mortgage bonds at the upset price of $1,000,000. The purchasers resold it within two weeks for over $5,000,000. It has been suggested that the separate divisions could be put up at an upset price regulated by the money value of their respective bonds as indicated by recent sales. But as there is, and has not been, any great demand for these bonds, their value cannot be fixed by any casual or isolated sales. If this be a safe guide, why adopt the form of a sale when the proportionate value could be fixed by the market value of the bonds? If an upset price cannot be fixed in this way, there is no way of fixing it without some further information. The practice of this court furnishes a mode of getting such information. Let the special master, E. S. Martin, take testimony, and report facts proved before him as follows: (1) What has been the relative earning capacity of these separate divisions for a period of five years; that is to say, what is the value of the aggregate of freight going over such division between its termini, and the value of its passenger traffic, and what are the necessary operation expenses. (2) What

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is the cost of repair of its roadbed and track. (3) What is the comparative estimate of the value of the respective divisions by disinterested persons who have had experience in railroads, furnishing such estimate under oath under cross-examination and giving the grounds for the estimate. (4) Any other facts bearing on this question of actual and relative value. Let the report contain only the facts given in evidence, so that the court can reach its own conclusion."

The court must determine from the particular facts of each separate case, keeping in view the rights of the mortgagor and the bondholders, as well as the claims of intervening creditors, and all the equities involved, the method of sale that will produce the best results to all parties in interest. When the court has so found, its decree should stand, unless the wrong and injustice attributed to it is made plainly to appear. Many of the cases reported, involving questions similar to those we are now considering, some of which have been cited and are relied upon by the appellants, are complicated by facts from which this case is free. Here the mortgages cover the entire property, and there is but a single franchise involved. We have here but one corporation, and not several consolidated companies with separate mortgages and various underlying liens upon distinct portions of the road. In such cases the courts have found it proper in some instances to sell separate portions of the road, or to offer it for sale both by divisions and as an entirety, accepting the offer most advantageous to the parties in interest. In other cases such sales seem to have been acquiesced in, no suggestion having been made that any particular interest involved in the suit would be prejudiced by the mode adopted. The case of Union Trust Co. v. Illinois Midland Ry. Co., 117 U. S. 434, 6 Sup. Ct. 809, relied upon by appellants, does not sustain the contention that, where distinct portions of the property to be sold are subject to separate mortgages or liens, that the decree of sale must provide for offering the same both as an entirety and in parcels; but it simply holds that under the circumstances of that case such manner of sale was entirely proper, and just to all parties in interest. That such a decree was rendered in that case is not surprising, and it would have been more than strange if the supreme court had not given it its approval.

Bank v. Shedd, 121 U. S. 74, 7 Sup. Ct. 807, and Gibert v. Railroad Co., 33 Grat. 586, are cases where decrees directing sales as entireties were sustained on appeal, because it did not appear that separate sales would have been more advantageous to the divisional bondholders. In the case we are now disposing of we think it is clearly shown that all of the divisional bondholders will obtain, in the distribution of the proceeds of the mortgaged property, a proportion more favorable to their interests from a sale made as an entirety than they would from one made in parcels and divisions. It might be possible that the holders of one series of bonds may be able, on account of the peculiar and favorable location of the division of the road on which their lien attaches, to hereafter make most desirable arrangements concerning it for purposes of their own, provided they can secure it at a separate sale; but that is a matter that did not impress the court below, and that will not influence this court in disposing of the questions that directly affect not only the bondholders

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of that particular division, but those of all other portions of the road. It is true that the appellants do not ask for a sale by division alone, but that the road shall be offered both as an entirety and by divisions, and the most advantageous bid accepted. As the decree appealed from directs a sale as an entirety, and as it would also be offered in that way if the present insistence of appellants should prevail, their idea must be that the sale by divisions will, in the aggregate, realize the greatest sum; and yet there is, in our opinion, an utter failure on their part to show by the evidence that such will be the result. If the sale by divisions should be made to realize more than the sale as an entirety, it can only be accomplished by abnormal bids on Division A, or on that division in connection with Division B, if we are to rely on the values placed on the property by the testimony returned with the master's report, which would result most disastrously to the Series C bonds, causing the holders thereof to depend on that division alone for their payment, destroying, in effect, their liens on Divisions A and B, and depriving them of their interest in the great value of the road as a unit. The court would not confirm such a sale, at least without first readjusting the ratio of apportionment of the proceeds so as to produce relatively the result that will be accomplished by the present decree. The court should not allow, by its decree of sale or by its method of distribution, the relative rights of any of the bondholders to be impaired, be the extent of their interests great or small. In the present contention there is but one mortgage, one railroad, and one franchise, but there are three series of bonds, differing greatly in value because of the location and intrinsic worth of the separate sections of the road by which they are secured, the least valuable being made still less valuable by the effort to debar them of the right to participate in the benefits to be derived from the sale of the mortgaged property as a whole. And this is to be effected, if at all, on the claim that the Series A bondholders are entitled to a separate sale of that division, not only as a matter of equity practice, but also under the terms of the mortgage. In our opinion, neither the practice referred to nor the contract mentioned will justify this court in directing a mode of procedure that will evidently produce injurious results to one set of bondholders, even if it causes desirable consequences to another.

In Campbell v. Railroad Co., 1 Woods, 368, Fed. Cas. No. 2,366, cited by appellants as a notable instance of the sale of separate divisions of the same road, the court (Mr. Justice Bradley on the circuit), while so holding under the peculiar facts there presented, took occasion nevertheless to say that:

"Cases often occur when a sale of the property out and out, and a subsequent adjustment of claims upon the fund, is the only just method which can be pursued. But whenever a specific property on which a separate incumbrance exists can be sold separately, *without injury or sacrifice of that or other property*, it ought to be thus sold, so as to secure to every incumbrancer, if practicable, the right of protecting his security without involving himself in onerous engagements, or being subjected to onerous conditions."

This conclusion of that eminent jurist, far from being overlooked or disregarded by us, has aided us materially in our investiga-

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tion of this case, and his words that we have placed in italics have had much to do in aiding us in reaching the result we now announce. Concluding, as we do, that a sale by divisions would, under the circumstances of this case, be inequitable, it follows, we think, that the "double method" insisted upon by the appellants would be improper, for the reason, among others, that, as the court would not confirm a divisional sale, the bids could only be used as a mode of ascertaining the relative values of the different interests, for which purpose they would, in our opinion, for the reasons already given, be useless.

The duty of the court in directing the method of sale in a case like this is both difficult and delicate. The interests appealing to it, each and all of them entitled to the same careful consideration, are many and conflicting. Here is a struggle between the holders of the three series of bonds, a contest as to a part of the property between those claiming under the first mortgage and those under the consolidated mortgage, an effort by the bondholders under the latter to save from the general wreck some little part, if possible, of their unfortunate investments, and here also, in submission to the court's decree, are the interests of the mortgagor and the rights of the public.

An extended discussion of the question of the valuation of the several divisions of the road, of the different branches, and of the interest of the Cape Fear & Yadkin Valley in the South Carolina Pacific Railroad, as shown by the master's report and the evidence returned with it, is not deemed essential by us. The matter was carefully examined by the court below, after full argument by counsel, and the values then fixed and the apportionments then made will not be disturbed by this court. Our investigation has involved the study of the master's report, including the testimony filed therewith, and the application of the same to the conceded facts of this case, and we reach the conclusion that the method adopted by the court below for the distribution of the proceeds of sale is one that, if it works injustice to the appellants, neither they, with their financial experience, nor their counsel, with all their legal ability, have been able to point out.

The assignments of error not specifically referred to have been in substance disposed of in the discussion of the general questions involved herein.

Counsel, in their oral arguments and on their briefs, discussed the proper construction, as well as the constitutionality, of the act of the general assembly of North Carolina of the 8th day of March, 1897, entitled "An act to amend section 698 of the Code," but we have not found it necessary to consider that legislation in connection with the questions raised in this case. The decree appealed from is affirmed.

PURNELL, District Judge (dissenting). I concur in the reasoning and conclusion that the coupons of the bonds must be paid before the bonds themselves, but cannot concur in the conclusion as to the method of sale. The holders of the different series of bonds, and especially of Series A, have never accepted the terms of the mortgage of 1889, and their rights must be adjudicated under the terms of the mortgage of 1886. Since the adoption of the state constitution

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in 1868 the policy and law of North Carolina in regard to corporations has been materially changed. Charters granted prior to 1868 were held to be contracts, which the legislature could not change without the consent of the corporation. In Mills v. Williams, 33 N. C. 561, Pearson, J., afterwards chief justice, speaking for the supreme court of the state, in a very learned opinion, after stating the difference between public and private corporations, says:

"The expectation of benefit to the public is the moving consideration on the one side, and that of expected remuneration for the outlay is the consideration for the other. It is a contract, and, therefore, cannot be modified, changed, or annulled without the consent of both parties."

This is in accord with many decisions of the supreme court of North Carolina and of the supreme court of the United States, following the decision of the latter court in the Dartmouth College Case, 4 Wheat. 518. The same doctrine is held in Railroad Co. v. Reid, 13 Wall. 264, which was a writ of error from the supreme court of the state reversed by the supreme court of the United States. The constitution since 1868 (article 8, § 1), reserves to the state the right to alter from time to time, or to repeal, all acts of incorporation other than municipal, and it is held that a corporation which has accepted an amendment to its charter since 1868 is under this provision. The large number of acts of incorporation passed at every session of the legislature shows the facility with which franchises are obtained, notwithstanding there is a general corporation law and a provision in the article of the constitution quoted that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes and in cases where, in the judgment of the legislature, the object of the corporation cannot be obtained under general laws." Whether the reservation in this article of the constitution would place charters granted by the legislature upon the same legal footing with charters with the right to diminish or impair the rights granted without the consent of the grantees, it is unnecessary to decide, but it would not give to the legislature power to disturb vested rights acquired in pursuance of a charter granted or former act of the legislature. A state legislature cannot impair the obligation of a contract or disturb vested rights in violation of the constitution of the United States. With the incorporators the legislature may deal; but when third parties, putting faith in an act of the legislature, have made contracts and acquired rights of property, the legislature cannot disturb them. Therefore the act of 1897, referred to, would be declared unconstitutional and inoperative if attempted to be applied to the mortgage made or the bonds issued in 1886 in pursuance of the act of the legislature of 1883. It is well settled that the laws which are in force at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of the contract as much as if they were incorporated in its terms. This principle embraces the acts which affect its validity, construction, discharge, and enforcement, or the remedies under the contract. Von Hoffman v. City of Quincy, 4 Wall. 535; Walker v. Whitehead, 16 Wall. 314; Barnitz v. Beverly, 163 U. S. 118, 16 Sup. Ct. 1042; Edwards v. Kearzey, 96 U. S. 595. Notwith-

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standing the constitutional provisions in article 8, before quoted, and a general railroad law in the state, it appears from the acts of the legislature—the only source from which courts can derive any authentic evidence of a state policy as to corporations (Swann v. Swann, 21 Fed. 301)—parties building or buying railroads in North Carolina almost invariably go to the legislature for a new franchise, it is reasonable to suppose that a purchaser at a sale of this property, either as an entirety or in divisions, would apply to that body for a new charter. The act of 1897, subject to all these objections and others, should not, therefore, "chill the sale," as said by the circuit judge, or in any way affect it; nor should its passage have any weight with a court of equity in determining the best method of sale for this important property. Lobbyists should not be permitted to affect pending litigation, especially when they are inadvertent to constitutional provisions.

Courts of equity do not make contracts. There can be no doubt about the principle contended for by appellees that under a deed of trust containing a power of sale application may be made to the court to decree a sale, but a court of equity will follow, as nearly as may be, the provisions of the deed itself. The application to the court does not change the contract made by the parties themselves, and, upon this principle that the parties have so contracted, preference is given to the holders of the coupons to the bonds themselves. To hold otherwise is, in effect, to hold that the court may do what the lawmaking power cannot,—impair the obligation of a contract.

The original purpose of this railroad seems to have been to establish railroad communication between Fayetteville, at the head of navigation on the Cape Fear river, and the coal beds of Chatham county, near the center, and not in the western part of the state, as is erroneously stated. From this original purpose the Cape Fear & Yadkin Valley Railroad has been formed by additions from time to time. At the date of the mortgage (1886) only that part known as "Division A" had been built, and the mortgage was on all the road then in esse to secure this series of bonds. I agree with the learned circuit judge that the usual and the best mode of ascertaining the value of property is by public auction, and, where the parties have by their own deed and contract established a method of sale, a court of equity should follow that method prescribed by the parties themselves. Expert testimony and estimates may be biased and influenced by circumstances of which the court can know nothing. They do not make values. The safest test of the value of property is what it will bring in the open market. The parties contracted as to how this property should be sold, and how its value should be ascertained, and that contract seems to me to be binding even on a court of equity. The mortgage provides that the property shall be sold "first as an entirety, and in case that no acceptable bidder is forthcoming for the said property as an entirety, then the said trustee shall proceed to sell separately the three divisions of the road hereinbefore made, and upon which the several series of bonds are hereby made or intended to be made first liens." Who is to determine what is an acceptable bid for the road as an entirety is left in doubt, and

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there is no means for determining how this question was to be settled. Is the bid to be acceptable to the trustee? To the bondholders? If so, to which class, or to the party of the first part? Or was it to be acceptable to all of these parties? A satisfactory answer to either question is not possible. Disregarding, then, this language, doubtful and ambiguous, the mortgage provides for the sale of the property first as an entirety and then by divisions, the bid to be accepted that realizes the best price for the parties directly interested in the property on which they hold the first lien,—what is known among auctioneers (an every-day practice at public sales) as an upset sale. The sole object of the court, keeping in view well-established principles, must be to secure to the parties in this cause the best result for the property in which they have an interest. This, it seems to me, will be accomplished by following the contract made by the parties themselves, and not invoking any of the extraordinary or extrajudicial powers of a court of equity.

Where there is a well-established rule of property in a state, the courts of the United States will follow that rule. Barber v. Railway Co., 166 U. S. 83, 17 Sup. Ct. 488, and cases cited. The rule in North Carolina in regard to mortgages and deeds of trust is well settled by a number of decisions of the supreme court of that state. The doctrine that a mortgage is a mere incident to the debt has never been favorably considered by the courts of the state, but these courts hold, with a rare exception, to the better doctrine that it is a direct appropriation of the mortgaged property to the payment of the debt, and a direct proceeding may be maintained to subject the property to the payment of the debt for which it is appropriated as a security. Murphy v. McNeil, 82 N. C. 221; Capehart v. Dettrick, 91 N. C. 344. It is equally as well settled that the grantor in a mortgage or deed of trust cannot, after execution, vary in any way the trust. Ingram v. Kirkpatrick, 41 N. C. 463; Hogan v. Strayhorn, 65 N. C. 279.

Applying these well-established rules of property to the case under consideration, the conclusion must be that the mortgage of 1886 was an appropriation of the road then constructed from Greensboro to the South Carolina line, known as "Division A," to the payment of the series of the bonds known as the "A" bonds; and of Division B, from Greensboro to Mt. Airy, not completed, to the payment of the series of bonds known as the "B" bonds; and Division C, from Fayetteville to Wilmington, not commenced, to the payment of the series of bonds known as the "Series C" bonds; and that after the execution of this mortgage neither the railroad company, the trustee, nor the legislature could vary the trust. Three years after, the debt being still unpaid, there remained in the company only an equity of redemption as to this property to be appropriated to the payment of the debt secured by the mortgage of 1889. Registration being legal notice, those claiming under this latter mortgage took with notice of the provisions of the mortgage of 1886, and it appears from the mortgage itself they had actual knowledge, and were well advised as to all of its provisions. They cannot now be heard to vary any of the trusts, remedies, or rights under the prior mortgage. Equity may grant them a hearing as to the distribution of the surplus funds after the debts

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secured by the prior mortgage are satisfied, and as to the best method of realizing the largest returns from a sale of the property, but they should not be heard to question the validity of prior liens subject to which they accepted a second lien. Bronson v. Railroad Co., 2 Wall. 283.

The mortgage provided for a distribution of the proceeds in the event of sale in language easily understood and constituting a part of the contract. The provisions are as follows:

"It [trustee] shall apply the residue of the proceeds of said sale [after paying certain expenses] to the payment, first, to the interest due on said bonds outstanding secured or intended to be secured hereby; and, secondly, to the principal of said bonds in full, if the said purchase money, after deducting the expenses above mentioned, be sufficient; but, if not, then pro rata."

"Pro rata" here means that creditors are to be paid or to prorate with those of the same class, and the holders of A bonds would be paid out of the funds arising out of the sale of the road as an entirety according to the bids for the property especially appropriated as a security for this series of bonds; and this rule would apply to the other divisions of the road, and the payment of the bonds for which they are appropriated as a security. There should therefore be a sale of the road first as an entirety, and then by divisions. It is so provided in the contract. With great deference, I dissent.

(86 Fed. 877.)

HART et al. v. BOWEN.

(Circuit Court of Appeals, Fifth Circuit. April 19, 1898.)

No. 597.

1. TRIAL—ORDER OF PROOF—DISCRETION OF COURT.
   It is within the discretion of a trial court to call attention to an omission of proof after plaintiff has formally closed his case, and on request to permit the omission to then be supplied.
2. SAME—REFUSAL OF INSTRUCTIONS.
   It is not error to refuse instructions asked, based upon general legal propositions, but not upon any evidence tending to show that such propositions are applicable to the facts of the case.
3. APPEAL—ASSIGNMENT OF ERROR.
   An assignment that the court erred in entering judgment in favor of the plaintiffs against the defendants is too general to be noticed.
4. SAME—ASSIGNMENTS MUST BE SPECIFIC.
   Assignments of error are required by the rules to point out the specific ground of error relied on, and an assignment that the court erred in charging the jury that there was no evidence establishing a defense is too general.
5. PARTNERSHIP—POWERS OF SURVIVING PARTNER—SETTLEMENT OF INDEBTEDNESS TO EMPLOYE.
   For 10 years an employé worked for a partnership without the amount of his compensation having been fixed, being permitted to draw what money he needed, which was charged to his account. At the end of that time the senior partner died, the business being continued in the firm name by the surviving partner, who was a son and heir of the deceased partner, and the remaining heirs. Afterwards, on a settlement made with the surviving partner and other of the heirs and the employé, the past salary of the latter was agreed upon, and the amount credited to his account on the books of the

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firm. *Held*, that such settlement was binding on the firm and the representatives of the deceased partner, unless set aside in a direct proceeding for that purpose on the ground of error, mistake, or fraud.

6. HUSBAND AND WIFE—RIGHT OF WIFE TO SUE—PARAPHERNAL PROPERTY.
Under the law of Louisiana a wife cannot maintain an action in her own name against others than her husband, except for the purpose of recovering or protecting her paraphernal funds or property.[1]

7. SAME—ESTOPPEL TO REQUIRE PROOF.
Where a married woman deposits funds with a partnership as her separate paraphernal property, and they are recognized and treated as such by the firm and by the representatives of a deceased partner, her account being kept separate from her husband's, she may recover such funds in her own name, without proving their paraphernal character, defendants being estopped to deny the fact.

In Error to the Circuit Court of the United States for the Eastern District of Louisana.

This action was instituted in the circuit court on the petition of Mrs. B. W. Bowen, wife of Reuben D. Bowen, and of said Reuben D. Bowen, each citizens of the state of Texas, and therein it was averred as follows: "That the estate of E. J. Hart, deceased, now being administered in the civil district court for the parish of Orleans under the number 45,308 of the docket thereof, and the commercial firm of E. J. Hart & Co., and Mrs. Juliana Hart, widow of said deceased, Miss Mary T. Hart, a feme sole of full age, Edmund J. Hart, Mrs. Julia H. Hall, widow of Charles K. Hall, deceased, John B. Hart, W. H. Jewell, Mrs. Henrietta H. Gordon, wife of W. A. Gordon, the individual members of said firm, each and all of said defendants being citizens of the state of Louisiana, and domiciled in this city and parish, are each justly and truly indebted in solido unto petitioners in the full sum of eighteen thousand one hundred and thirty-five dollars ($18,135), with interest at the rate of six per cent. per annum, payable monthly, on ten thousand dollars from March 1, 1896, until paid, and on eight thousand one hundred and thirty-five dollars from April 1, 1896, until paid, being for $18,122.13 your petitioner Mrs. B. W. Bowen has on deposit with said firm of E. J. Hart & Co. and a balance of $12.87 to her credit on an open account with said firm. Petitioners aver that E. J. Hart, deceased, as aforesaid, was a member of said firm of E. J. Hart & Co., and a citizen of the state of Louisiana, up to the time of his death, and that said firm and the business thereof has since been carried on and conducted by the other defendants hereinbefore named; that for a number of years previous to the death of the said senior member of said firm, and to the present time, your petitioner Mrs. B. W. Bowen has kept a deposit account with the said firm upon the condition and with the agreement and stipulation that the said E. J. Hart & Co. should allow and pay her monthly interest at the rate of 6 per cent. per annum on the amounts to her credit both on her deposit and on her open account; that ever since July 27, 1895, the amount to the credit of your said petitioner Mrs. B. W. Bowen on her deposit account with said firm has been, and is now, $18,122.13, and that up to March 1, 1896, the said firm paid to her each and every month the interest due thereon as stipulated and agreed, and she was also paid by said firm the interest on eight thousand one hundred and twenty-two and $^{13}/_{100}$ dollars ($8,122.13) of her deposit credit for the month of March, 1896, and up to April 1, 1896, but she has not been paid any interest whatsoever since April 1, 1896, although the same has been frequently demanded from said firm. Further, petitioners aver that your petitioner Mrs. B. W. Bowen has a right to withdraw the said deposit, and demand a settlement from said E. J. Hart & Co., at any time, and that the full amount of said $18,135 was due and payable to her by said E. J. Hart & Co. as soon as demanded from them, and she has made due and frequent demand upon said E. J. Hart & Co. for the same, but without avail, and the said E. J. Hart & Co. still refuses and neglects to pay to petitioner any part of the amount so due to her or even the interest thereon. Further, petitioners aver that the said indebtedness of said firm belongs to your

[1] See note at end of case.

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petitioner Mrs. B. W. Bowen individually, and is her separate property." The petition closed with a suitable prayer for judgment. To this petition all the defendants appeared by counsel, and filed exceptions on the ground of vagueness and indefiniteness, and for grounds assigned as follows: "(1) That, although it is alleged in the body of the petition that the debt claimed is due to Mrs. B. W. Bowen individually, the action is brought in the name of both R. D. Bowen and his wife, Mrs. B. W. Bowen, and the prayer is for judgment in favor of both said petitioners, and thus defendants are not advised who is the real plaintiff, and in whose favor judgment is claimed. (2) That, although it appears on the face of the petition that Mrs. B. W. Bowen is a married woman, and that the deposit account alleged therein was kept with her as a married woman, yet it is alleged that the said indebtedness is her separate property, and no fact whatever is alleged upon which this allegation is based, or which would take this claim out of the rule and presumption of law that all property acquired during marriage by either spouse belongs to the community of acquets and gains subsisting between husband and wife. (3) That in other respects the allegations of said petition are so vague and indefinite that defendants cannot safely answer thereunto." On the hearing of these exceptions the court ordered that they be "maintained so as to require the plaintiffs to amend their petition so as to pray for judgment in the name of the wife, and thereupon the plaintiffs were allowed to amend their petition accordingly." No formal amendment appears to have been made, but thereafter the action proceeded the same as if the husband, Reuben D. Bowen, had been eliminated as a party from the case. The executors of E. J. Hart, deceased, answered with a special defense to the effect that the claim sued on was not the separate property of Mrs. B. W. Bowen, the plaintiff, but was a claim belonging to the community of acquets and gains subsisting between said Mrs. Bowen and her husband, and asserting that Mrs. Bowen had no right or power to sue on said claim or stand in judgment thereon; and generally they answered, alleging as follows: "That prior to the death of E. J. Hart, Sr., the firm of E. J. Hart & Co. existed and was composed of E. J. Hart, Sr., and E. J. Hart, Jr.; that at the death of E. J. Hart, Sr., which occurred on March 8, 1895, the said firm was dissolved, and the business thereof was continued by the surviving partner, E. J. Hart, Jr., as liquidating partner, and for purposes of liquidation only; and that the succession of E. J. Hart, Sr., was only bound for the debts of said firm existing at the date of his death, and for debts subsequently incurred for legitimate purposes of liquidation or inuring to the benefit of said firm in liquidation. That on March 8th, 1895, the death of E. J. Hart, Sr., the account of Mrs. B. W. Bowen showed that she was a creditor of said firm only in the sum of $5,153.74; that thereafter said account was continued on the books of the firm in liquidation, and numerous items of debit and credit were entered thereon, resulting in a final balance as shown by said books in favor of Mrs. B. W. Bowen of the sum claimed in the petition herein, viz. $18,135; that with regard to all said items (save one, which will hereafter be specially referred to) these respondents, while not undertaking to deny that they are charges which may be binding on the succession of E. J. Hart, yet say that it is their official right and duty to require due proof of such liability before judgment shall be rendered against said succession therefor; that the excepted item above referred to is a credit of $10,000 entered on said account on the 27th of July, 1895, which said credit is claimed herein as a deposit, whereas no such deposit was made, but the same is a simple transfer to the account of Mrs. B. W. Bowen of an alleged credit standing on the books of the firm in liquidation in favor of her husband, R. D. Bowen, which transfer was made by order of her said husband; and respondents deny that said R. D. Bowen was entitled to any credit whatever, and aver that the credit in favor of Mrs. B. W. Bowen was without consideration, and was not binding on the succession of E. J. Hart. Respondents aver that from 1885 down to the death of E. J. Hart, R. D. Bowen had been an employé of E. J. Hart & Co.; that prior to January, 1890, he had been employed under an agreement to pay him commission on the goods sold by him, and that from and after January, 1890, he was employed at a fixed salary of $150 a month; and that the aforesaid remuneration for his services was duly and fully paid him; that from the 3d of October, 1895, the said R. D. Bowen kept a continuous running account with the firm of E. J. Hart & Co.,

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and at the death of E. J. Hart, Sr., said account showed a balance due by said R. D. Bowen of about $12,000; that after said death, as respondents are informed, said R. D. Bowen made a claim upon the liquidating partner for additional remuneration for his services during the entire term thereof from 1885 down to July, 1895; that said claim was based on noncontract of the firm of E. J. Hart & Co., and on no legal obligation of said firm; that, nevertheless, the liquidating partner, E. J. Hart, Jr., for the reasons assigned in his separate answer herein, allowed said claim, and permitted a credit of the enormous sum of $19,228.43 to be entered on the books to the credit of R. D. Bowen, thereby making him appear on said books as a creditor of said firm, whereas he was and is a large debtor; that shortly thereafter the said R. D. Bowen, who remained in the employ of the liquidator, ordered the transfer of $10,000 from his account to the account of his wife, Mrs. B. W. Bowen, and the same forms a part of the amount claimed in this suit. Now, these respondents aver that the succession of E. J. Hart is in no manner bound by the aforesaid transactions, and that the said item is not due by said succession or by the firm of E. J. Hart & Co., in liquidation."

Several of the heirs of E. J. Hart, deceased, by the same counsel, filed an answer specially denying that they had ever been members of the firm of E. J. Hart & Co., and adopting all the special defenses to the plaintiff's claim set up in the executors' answer. E. J. Hart, the surviving member of the firm of E. J. Hart & Co., and an heir to E. J. Hart, deceased, filed a separate answer, adopting all the special defenses set up by the executors, and otherwise alleged as follows: "Further specially answering, this respondent says that true it is, as set forth in the answers of the executors above referred to, that this respondent, acting solely in his capacity of liquidating partner of the firm of E. J. Hart & Co., did consent to the entry on the books of said firm of a credit in favor of R. D. Bowen of $19,228.43 on July 26, 1895; that this consent was given at the pressing solicitation of said R. D. Bowen, and upon his representations as to the value of the services which he had rendered the firm, and as to the inadequacy of the remuneration which he had received, and on his representation that respondent's father, during his life, had often indicated his purpose at some future time to make him an additional allowance for said past services, and that, had he lived, he would have done so. Respondent, at that time, was of the opinion that the services of R. D. Bowen had been inadequately remunerated, and he was aware that said Bowen had frequently importuned his father for an additional allowance, and that his father had put him off with promises that he would consider the matter, and determine about it at some future time; and, although there was no legal obligation, he then believed that, if his father had lived, he would, in a final settlement with said Bowen, have made him some additional allowance for his past services. Under these circumstances, and to put an end to Bowen's importunities, respondent consented to the entry of said credit; but both Bowen and respondent well knew that respondent was acting solely as liquidating partner, and that as such he had no power to bind the firm by creating a debt for past services, and that the validity and effect of said entry would depend upon its approval by the executors and heirs of E. J. Hart, or upon proof that it was a legal obligation of the firm, if contested by them. Respondent further says that it was well known and understood by Bowen that in making said entry respondent did not assume, or intend to assume, any separate or personal obligation therefor, but only such obligation as would result from his interest in the firm in case it should be approved by the other parties in interest, or should be maintained as a legal obligation of the firm, and respondent says that he was only a salaried partner in said firm, and had no interest therein except as one of the heirs and legatees of his father. Respondent further says that the transfer of $10,000 of said credit by order of R. D. Bowen from his account to the account of his wife did not confer upon the latter any rights which R. D. Bowen did not have, and that her right to recover to the extent of said $10,000 depends upon proof by her that the claim represented thereby was a valid and legal obligation of the firm of E. J. Hart & Co. to R. D Bowen. Respondent specially denies that he is in any manner indebted for said sum, or for any other portion of plaintiff's claim, unless the court shall find the same to be an obligation of the firm, and equally binding upon the succession

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of E. J. Hart; and that he is entitled to avail himself of all the defenses which have been set up in the answer of the executors which he has hereinbefore set up and adopted as a part of his answer. Respondent further says that since the entry of the credit of $19,229.43 to the account of R. D. Bowen, he has discovered various facts and transactions of said Bowen while in the service of E. J. Hart & Co. which materially affect the value of his services, and the meritoriousness of his equitable claim for additional remuneration, and that, if he had known of these facts at the time, he would not have consented to said entry; and he further says that, while he then believed that his father, if living, would have made him some allowance on final settlement, he now believes that, if these facts had been made known to him, his father would never have done so."

Upon the issues made by these pleadings the parties went to trial before a jury, and the result was a verdict by direction of the trial judge in favor of the plaintiff and against all the defendants. The defendants, all joining, sued out this writ of error, assigning errors as follows: "(1) The court erred in reopening the case of plaintiffs after the plaintiffs had formally closed their case, and after counsel for defendants had opened the case for defendants, and in then permitting the plaintiffs to offer further evidence on the question of paraphernality of the claim of the plaintiff, upon which question no evidence had been offered by plaintiffs before they closed their case, all as fully recited in bill of exceptions No. 1, signed by the judge, and hereby referred to and made part of this assignment of errors. (2) The court erred in making the charge to the jury in refusing to make each and every one of the special charges requested by the defendants, being the twenty-three special charges stated at length in bill of exceptions No. 2, signed by the judge, and herein filed, which said bill of exceptions is hereby referred to, and made part of this assignment. (3) The court erred in stating to the jury that the evidence in the case established nothing that sustained any defense to the claim of plaintiffs, and in directing the jury to find a verdict for the plaintiffs, which action of the court is fully set forth in bill of exceptions No. 3, signed by the judge, and herein filed, which said bill of exceptions is hereby referred to, and made part of this assignment. (4) The court erred in entering judgment in favor of the plaintiffs and against these defendants."

Chas. E. Fenner, H. J. Leovy, and Guy M. Horner, for plaintiffs in error.

D. C. Mellen and J. Ward Gurley, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PARDEE, Circuit Judge, after stating the issues and proceedings as above, delivered the opinion of the court.

The plaintiffs in error complain in their first assignment of error that the court below erred in reopening the case of the plaintiffs after they had formally closed their case, and after counsel for the defense had opened the case for the defendants, and in thereafter permitting the plaintiffs to offer further evidence. The bill of exceptions upon which this assignment is based shows the following proceeding:

"The counsel for plaintiff, after offering evidence, had formally announced that he had closed the case of plaintiff, whereupon counsel for defendant proceeded to open the case of defendant by addressing the jury, explaining the points on which he relied, and facts which he expected to prove, and, having closed his statement, was about to proceed to offer his evidence, when his honor, the judge, suspended the proceeding, and ordered the jury to retire; that, after the jury retired, his honor, the judge, addressed the counsel, and said to the counsel for the plaintiff that he had failed to offer any proof of the paraphernality of the wife's claim herein sued on,

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and inquired whether he desired to administer such proof; that thereupon, after some discussion, the counsel for plaintiff expressed his desire then to offer such proof, and applied to be permitted to do so; that thereupon the counsel for defendants objected to the granting of the said application, on the ground that plaintiffs had formally closed their case, and that counsel for defendants had opened the case of defendants and that plaintiffs could offer no further evidence, except in rebuttal of testimony which might be offered by defendants; that his honor, the judge, overruled the said objections, stating that it was a matter within his discretion; and that, if he should sustain such objections, it would furnish grounds for the granting of a new trial, and he therefore granted the application of counsel for plaintiff, and ordered them to proceed with the offering of their testimony."

We understand it to be well settled that the order in which parties shall be permitted to offer their evidence in the trial of a case before a jury is a matter within the sound discretion of the trial judge. The facts recited in the bill do not show any abuse of such sound discretion, nor any resulting injury to the plaintiffs in error.

The second assignment of error is that the court erred in charging the jury, and refusing each and every one of the 23 special charges stated at length in the bill of exceptions No. 2. The bill of exceptions No. 2 does not show any charge to the jury given by the trial judge, but does show that, after the plaintiffs and defendants had closed the case, and the same was about to be submitted to the jury, the court refused to give as special charges to the jury some 24 distinct propositions of law, many based on cited textbooks and adjudged cases, but not based on any evidence tending to show that any one of the propositions suggested was applicable to the facts in the case. It is plain that this assignment of error cannot be considered.

The fourth assignment of error complains that the court entered judgment in favor of the plaintiffs against the defendants. This assignment is too general to be noticed.

There remains the third assignment of error, which complains that the trial judge stated to the jury that the evidence in the case established nothing that sustained any defense to the claim of plaintiffs, and directed the jury to find a verdict for the plaintiffs. This assignment is not in pursuance of our rules. It is too general and indefinite; and, but for the briefs of counsel, we should be at a loss to know the specific error or errors presented for review. Sooner or later some important case that should be reversed on error will be affirmed simply because counsel will not heed the rules of this court in regard to pointing out in the assignment of errors the specific errors on which they rely. The general ruling complained of is shown by a bill of exceptions, to which is attached all the evidence adduced in the case, from an examination of which we find the material facts proved to be as follows: In July, 1885, R. D. Bowen was employed by the firm of E. J. Hart & Co., and continued with that firm, occupying different positions, until March 15, 1896. At the beginning of his employment said firm was composed of E. J. Hart, Sr., and E. J. Hart, Jr., who continued to constitute the firm until the death of Hart, Sr., in March, 1895. Up to the death of E. J. Hart, Sr., no agreement was ever made as to the amount of salary to be received by Bowen, although

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many efforts were made from time to time by Mr. Bowen to have a definite understanding, and have his salary fixed. E. J. Hart, Sr., would, however, always put the matter off, saying he would arrange it later, and that Bowen could draw what money he needed. The settlement of the matter was thus continually postponed, and up to the death of Hart, Sr., Bowen's salary had never been agreed upon. After the death of Hart, Sr., Bowen, unwilling that his affairs should remain longer in this uncertain state, renewed his efforts to have his yearly salary fixed from the time he went into the employment of the firm. The business was still being conducted in the name of E. J. Hart & Co., announcement being made about two days after the death of Hart, Sr., in the public press and in a circular letter that the death of Hart, Sr., would not interrupt the firm's business, and E. J. Hart, Jr., the surviving partner, and one of the executors of his father's will (his mother and one of his sisters being co-executors), was then in charge. After repeated conferences between Bowen and E. J. Hart, surviving partners, executor, and heir, Dr. John B. Hart and Walter Jewell, also heirs, defendants herein, a settlement was made on July 26, 1895, by which Bowen was allowed for his salary from August, 1885, up to July 25, 1895, $33,950, and also $5,590.60 amount advanced by him for account of the firm, aggregating $39,540.60, which, being credited to his account, gave him a net credit on the books of the firm of about $11,000. Until the latter part of February, 1896, Bowen had no intimation that this settlement would be questioned by any one. E. J. Hart, Jr., then told him that some of his father's heirs were making complaint about the settlement. They had all known of the settlement since the early part of the fall of 1895. Before Bowen received credit for the sum allowed by this settlement his account appeared to be about $14,000 overdrawn. This was due to the fact that during the whole term of his employment he had been credited with only about $500 for some years, $600 or $700 for others, and $1,200 and $1,500 for other years, and never more than $1,800 for any year; and he had not been credited with several thousand dollars charged to his account, but which he had expended for the firm's benefit. The entries of the credits for salary were made, however, pro forma, and only for the avowed purpose of enabling the firm to balance the books and were not considered as binding upon Bowen or as fixing his salary. In order to keep the books straight, some sort of an entry had to be made, and these pro forma entries were resorted to, and Bowen was permitted to draw money as he needed it, until his salary should be fixed. For several years prior to the death of Hart, Sr., and up to the date of settlement, Bowen had been general manager of the firm, and for this period he was allowed by the settlement $4,200 a year, and it was agreed that this salary should continue, and that he was to be paid $350 a month. Bowen remained with the firm under this contract for seven and a half months; but, while he was paid and charged with that sum every month for seven months, they credited him with only $150 a month. He was sent to New York in the fall of 1895 for the purpose of borrow-

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ing for the firm $55,000. To accomplish this, he was detained in New York over two months. He paid out of his own pocket all the traveling expenses of this trip, and all his expenses during his stay in New York, but E. J. Hart has refused to reimburse him, or to allow him credit therefor. Although the firm credited him with only $150 a month for seven months ($200 a month less than he was entitled to), and gave him no credit for the half of March, 1896, making a total shortage in credits due on his salary of $1,575, and the firm entered nothing to his credit for the expenses of his trip to New York, which probably exceeded $1,000 (he was not allowed under defendants' objections to prove the amount), the firm's account against him shows an indebtedness of only $2,400. Prior to the institution of this suit, Bowen, hearing that Hart claimed he was indebted to the firm in the sum of $3,000, repeatedly demanded his account from Mr. Hart, and wrote him two letters requesting the rendition of his account, stating that, if he owed the firm anything, he would pay it. He never got the account. Hart says he has no recollection of receiving these letters, but letter-press copies of them were introduced in evidence, and the witness who delivered them testified that he left one at the firm's office, and gave the other to Mr. Hart personally at his home. In 1893, upon the solicitation of the firm, who offered to pay her 6 per cent. interest on her deposits, Mrs. Bowen, the plaintiff below, and in her own right possessed of separate property and funds, opened an account with the firm by making a deposit of $1,200. She continued from time to time to make other deposits of her own moneys, and from time to time, as she wished, drew out such sums as she needed. The firm acted as her banker, and kept her account separate and distinct from her husband's, and regularly allowed her interest on her deposits, always treating and recognizing her as the owner of these funds. When Hart, Sr., died, in March, 1895, she had to her credit $5,157.74. At this time, Bowen, according to the firm's account with him, appeared to owe $9,497.62, and he had for years appeared to be a debtor on this account. Nevertheless the firm had always paid Mrs. Bowen interest on her account. After the death of E. J. Hart, Sr., Mrs. Bowen continued to make deposits with the firm as before, and on July 25, 1895, the date of the settlement with Bowen, the firm owed her $8,122.13. When R. D. Bowen's account was credited with the amount allowed on that settlement of July 26, 1895, he became a creditor for nearly $11,000. He at once directed the firm's cashier, Mr. Sewell, to transfer $10,000 from his own to his wife's account, which was done. The firm, through Mr. Sewell, then gave its receipts certifying that Mrs. Bowen had on deposit with the firm $18,122, upon which they agreed to pay 6 per cent. interest per annum. They paid her interest monthly on the whole of this sum up to March 1, 1896, but for March they paid interest only on $8,135, and after that time declined to pay her any interest. The executors' account was filed March 25, 1896, and accounted for the year's business after the death of E. J. Hart, Sr., and showed that, among others, they had made the following disbursements for account of the firm's business, viz.:

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Bills payable, $405,040.71; expenses, salaries, and interest, etc., in conducting the business of E. J. Hart & Co., $120,899.17; paid for merchandise, $391,593.11. During the whole of this period the business of the firm was carried on in the name of E. J. Hart & Co. All the letters, papers, and documents concerning the business were signed simply, "E. J. Hart & Co.," no indication being given of liquidation. On the contrary, they insisted that they had no intention of liquidation or retiring from business. In 1876, E. J. Hart, Sr., and E. J. Hart, Jr., organized the firm of E. J. Hart & Co. The articles of co-partnership contained the following provision: "In the event of the death of either partner, the business is to be continued by the survivor."

On these facts the trial judge directed a verdict for the plaintiff below on the ground that under them the defendants had no legitimate defense, and we agree with him in this conclusion. Under the facts proven, it does not appear that on a legitimate settlement and adjustment of accounts between R. D. Bowen and the firm of E. J. Hart & Co. (the claims and demands of Mrs. Bowen taken as valid) that Bowen is legitimately indebted to the firm in any sum whatever which could be offset against the demands in this suit, even if sued for by R. D. Bowen as community property. There is no doubt, under the evidence, that the compensation for the services rendered by Bowen to the firm of E. J. Hart & Co. was undetermined during the lifetime of E. J. Hart, Sr., and was a matter to be settled and adjusted, and, when settled, was to be in excess, not only of the pro forma credits made on the books, but in excess of the amounts which Bowen was allowed and did overdraw. Bowen thus had a legitimate claim for settlement with the firm of E. J. Hart & Co., and it was competent for E. J. Hart, Jr., the surviving partner, whether he was liquidating the partnership, or carrying on the same under the original articles of partnership, or with the consent of the heirs of E. J. Hart, Sr., to settle, adjust, and compromise the claim of Bowen. There is no dispute that this settlement adjusting and compromising the matters in dispute was made. After being made and executed, as it unquestionably was, it can only be avoided and set aside in a direct action for the purpose, and on grounds of error, mistake, or fraud. Certainly it cannot be attacked and annulled in a collateral action brought by Mrs. Bowen to recover her separate property. The $10,000 transferred from the credit of R. D. Bowen to the credit of Mrs. Bowen was a perfect transfer, accepted and recognized by the firm, and, if a gift from the husband to the wife, was perfected in sufficient compliance with the provisions of the Louisiana Revised Civil Code relating to manual gifts. See Stauffer v. Morgan, 39 La. Ann. 632, 2 South. 98.

The alleged radical and fundamental error committed by the judge a quo in directing a verdict for the plaintiff, as assigned in the brief of the plaintiffs in error, was in holding that the plaintiff could recover judgment without proof of the paraphernality of the claim sued upon. The record does not show that the judge so held, and, if he did, it was unnecessary. We agree with the learned

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counsel for the plaintiffs in error that under the law of Louisiana the wife in her own name cannot maintain an action against others than her husband, unless it be to recover or protect her paraphernal funds and property, and that the wife has no capacity to sue or be sued, or to stand in judgment for a community right or obligation. What doubt may have existed in our minds with regard to these propositions prior to the argument in this case has been wholly removed by the learned and exhaustive briefs on the subject, teeming with arguments and authorities, submitted by counsel for plaintiffs in error on and after the hearing in reply to the opposing counsel, who seemed to doubt. But we think that neither of these propositions controls this case. Mrs. Bowen had separate paraphernal property. It was managed and invested for her. The deposits made with the firm of E. J. Hart & Co. were made by her as of her paraphernal property. As such property, the firm of E. J. Hart & Co. received it, held it, paid interest on it, and fully acknowledged it up to about the time this suit was brought, and, so far as the evidence in this case goes, neither the firm of E. J. Hart & Co. nor any of the defendants have any legal interest or right to deny that the moneys sued for are Mrs. Bowen's separate paraphernal property. As the case shows that Mrs. Bowen claimed and deposited the moneys sued for as her paraphernal property, and as the defendants are estopped from denying the fact, we are of opinion that the paraphernality of the claim sued on was sufficiently proved to warrant the verdict directed. On the whole case, we find no reversible error, and the judgment of the circuit court is affirmed.

NOTE.

Paraphernal Property.

[a] (La. Sup. 1887) Where a man, on the eve of marriage, gives to his intended spouse a check for $20,000 on a banking firm, the donation may be incomplete and revocable at any time before actual collection of the check by the donee; but when she has presented the check, and the drawees have honored the same, by placing the amount to her individual credit, under her instructions, the donation is complete, and the funds are her paraphernal property. And, when property is bought in the name of the wife, she has the faculty of rebutting the presumption that it is community property by showing that she purchased the property by the investment of her paraphernal funds, which were administered by her separately and apart from her husband.—Stauffer v. Morgan, 2 South. 98, 39 La. Ann. 632.

[b] (Eng. 1895) Gifts of jewelry made by husband to wife on occasions such as Christmas day, or on her birthdays, or in order to settle differences that had arisen between them, are not paraphernalia, unless it can be shown that the husband intended to impress the character of paraphernalia upon them.—Tasker v. Tasker [1895] Prob. 1, 11 Reports, 619.

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(87 Fed. 427.)

CENTRAL TRUST CO. OF NEW YORK et al. v. INGERSOLL.

(Circuit Court of Appeals, Sixth Circuit. May 16, 1898.)

1. CREDITORS' BILL—ATTORNEY'S FEES.
After the sale of railroad property under a mortgage foreclosure suit consolidated with a creditors' bill, an order of reference was made to ascertain what property was not covered by the mortgage. In this order the special master was directed to notify appellee as counsel for the unsecured creditors. *Held*, that such order, made in the presence of counsel for other unsecured creditors, was sufficient to justify him in representing the creditors in the proceeding before the master, and to entitle him to fees out of the funds made, subject to the payment of the unsecured creditors.

2. SAME.
The fact that the parties opposing such allowance owned a very large proportion of the unsecured debts allowed out of such fund was of no effect, where such claims were not filed until after the special master had ascertained and reported the property subject to the unsecured debts. Nor was it material that such opposing parties had bought or owned part of the debt which the counsel represented.

3. ATTORNEY'S FEES—REVIEW.
Where an allowance of $2,500, as attorney's fees, was recommended by the special master, but the sum was increased by the court to $3,300, *held*, that the allowance, though liberal, would not be disturbed on appeal.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

This was a creditors' bill by Samuel Thomas against the East Tennessee, Virginia & Georgia Railway Company, which suit was consolidated with the foreclosure suits of the Central Trust Company of New York against the same defendant. Henry H. Ingersoll filed an intervening petition for attorney's fees. From the decree allowing such compensation, this appeal is taken.

The record is a voluminous one in this case, but the facts material to the disposition of the present appeal are, briefly, these: Samuel Thomas filed his bill against the East Tennessee, Virginia & Georgia Railway Company, June 24, 1892, in which he claimed that he was a creditor of that company, owning a floating debt of over $400,000, and alleged, also, that he was a large stockholder. The bill was brought as a creditors' bill for all those who chose to come in. It alleged the hopeless insolvency of the railway company, and that it was liable to be seized for debt, and the railway system dismembered thereby, and the value of the property materially impaired, and asked for a receiver for the railroad property. Receivers were appointed under this bill, and took possession of all the defendant's railway and other property, and operated the road. Subsequently, on the 3d day of March, 1893, the Central Trust Company of New York filed two bills in the same court to foreclose mortgages on the property of the East Tennessee, Virginia & Georgia Railway Company. The suit of Thomas was consolidated with these suits for foreclosure of the mortgages, and the cause proceeded to judgment, and the property was sold by order of court. At the sale of the property under the decree it was bought in by the committee of reorganization, and the sale confirmed to a new corporation, called the "Southern Railway Company," on the 14th of July, 1894. The suit of Thomas was not prosecuted in the interest of the general unsecured creditors, and nothing seems to have been done in that direction. That bill seems to have been brought and controlled solely to have a receiver appointed, and to prevent waste and the depreciation of the property, and in the interest of the mortgagees, and the compensation of counsel who filed that bill was paid out of the purchase money of the mort-

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gaged property. Prior to the sale of the railway property a number of creditors had intervened in the consolidated cause, and, upon the suggestion of counsel for the unsecured debts that there was property in the hands of the receiver which was not covered by the mortgages, the court, on the day on which the sale of the mortgaged property was confirmed, made an order of reference to Joshua W. Caldwell, Esq., as special master, with direction to ascertain and report what property was not covered by the mortgages and the value of said property, both real and personal. In this order the special master was directed, after notifying W. A. Henderson, counsel for the receivers, and H. H. Ingersoll, counsel for the creditors not secured by mortgage, to hear any proofs offered by either party, and report the result of the investigation. The special master under this reference made investigation, and reported a considerable amount of real and personal estate which had not been covered by either of the mortgages foreclosed, and included therein a short road, about six miles in length, and known as the Tennessee Valley Railroad. The par of the stocks and bonds thus reported was a very large amount, but it was really of little value. The property which was thus reported and subsequently made subject to the unsecured debts was sold, and realized about $50,000. On the 17th of September, 1895, the appellee filed an intervening petition, asking compensation for his services as attorney out of the fund made subject to the payment of the unsecured creditors. This intervening petition was answered by the East Tennessee, Virginia & Georgia Railway Company and the Central Trust Company of New York, in which it was denied that the appellee was entitled to any compensation out of the fund. The court on the same day the petition was filed referred it to H. H. Taylor, as special master, to hear proof and report on the matters of the petition,—whether or not he was entitled to any compensation, and, if so, the amount thereof. The special master, Taylor, heard evidence, and reported on July 3, 1896, that the appellee was entitled to compensation, and fixed it at $2,500. Exceptions were filed to this report by the appellee, and also by the Central Trust Company and the Southern Railway Company and C. H. Coster. The several exceptions were subsequently heard by the court, and the exceptions of the Central Trust Company and others were overruled, and the exception as to the amount of the allowance to appellee sustained, and his compensation increased to $3,300, and that sum allowed him. From this decree allowing said compensation the present appeal has been taken.

H. L. Welcker, for appellants.
T. L. Webb, for appellee.

Before HARLAN, Circuit Justice, TAFT, Circuit Judge, and BARR, District Judge.

BARR, District Judge, after stating the facts as above, delivered the opinion of the court.

The assignment of error raises two questions. It is insisted—First, that the appellee, Ingersoll, is not entitled to any compensation out of the general fund; and, second, if he is entitled to compensation, the compensation allowed is excessive. It seems to us that the order directing the special master, Caldwell, to notify the petitioner, Ingersoll, as counsel for the creditors not secured by the mortgages, was a recognition by the court of his representative character; and, as it appears that this order was made in the presence of counsel for other unsecured creditors, we think it was sufficient to authorize petitioner, Ingersoll, in the absence of objections from other counsel, to go on and represent the unsecured creditors before the special master, which he did. There is much evidence taken before the special master showing what was done and what was not done by the petitioner, Ingersoll; and the result, we think, is to show that Caldwell, the special

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master, was himself exceedingly familiar with the whole matter which he was directed to investigate, and that he did some of the work which might have been properly done by counsel, but that Ingersoll was the representative counsel before the special master, and argued the exceptions upon the report, and prepared the necessary orders to subject the property. During this reference the appellants had not filed their claims as unsecured creditors; and the appellants, especially the Southern Railway Company, were claiming as purchasers adversely to the interest of the unsecured creditors. This being true, he is entitled to a reasonable compensation to be paid out of the fund which has been subjected to the payment of the unsecured creditors. Trustees v. Greenough, 105 U. S. 527.

In regard to the amount of the compensation allowed, it would seem from the record before us to be quite liberal; but as the special master reported $2,500, which was the smallest amount proven by any of the witnesses before him, and as the learned trial judge has increased the same to $3,300, we think we should not disturb it. The supreme court, by Justice Bradley, in the case of Trustees v. Greenough, above, said, in speaking of such allowances (page 537):

"The allowances made for these purposes we have examined, and do not find anything therein seriously objectionable. The court below should have considerable latitude of discretion on the subject, as it has far better means of knowing what is just and reasonable than an appellate court can have."

The earnest contention of appellants, that the unsecured debts which they own embrace nearly all of the debt allowed as unsecured debts to participate in the fund arising from the property reported by Caldwell as not being covered by the mortgages, and that, therefore, no allowance should be made out of the fund, should not, we think, have weight. It is true that it appears in the record that over $15,253,000 was allowed as unsecured debts against this fund, and that a very large amount of this—$15,000,000 or over—is owned by the appellants or those in their interest; yet, as almost all of this large debt is composed of mortgage bonds and came in under the supplemental bill filed by the Southern Railway Company, Coster, and others, January 30, 1896, and after the special master, Caldwell, had ascertained and reported the property subject to the unsecured debts, we think the ownership of this large amount of the unsecured debts should not affect the question. It is quite clear that the owners of none of the bonds represented by the trust company and none of the bonds or debts owned or represented by the Southern Railway Company and its associates took part in ascertaining and subjecting the property which was reported and subjected to the unsecured debts; nor should the fact that the appellant C. H. Coster has bought or owns part of the debt which the petitioner represented make his compensation any the less. The decree of the circuit court should be affirmed, and it is so ordered.

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(87 Fed. 446.)

GALLOT v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 19, 1898.)

No. 647.

1. ASSIGNMENT OF ERRORS — REFERENCE TO ENTIRE CHARGE — EVIDENCE ADMITTED.

Under rule 11 of the circuit court of appeals (21 C. C. A. cxi., and 78 Fed. cxi.), requiring the assignment of errors to quote the full substance of evidence alleged to have been erroneously admitted or rejected, and to set out the part of the charge referred to totidem verbis, assignments that "the court erred in permitting evidence as shown in bills of exceptions numbers two and three," which errors can only be ascertained by a careful reading of a voluminous record, and that "the court erred in its charge," etc., referring to marked lines and numbers in the written opinion for instructions erroneously given and refused, will not be considered.

2. MISAPPLICATION OF NATIONAL BANK FUNDS—AIDING AND ABETTING—DEATH OF PRINCIPAL.

The death of the principal before indictment is no obstacle to the prosecution and punishment of one charged with aiding and abetting an officer, clerk, or agent of a national bank to abstract, misapply, or embezzle the funds thereof, in violation of Rev. St. § 5209, which makes such offense a misdemeanor.

3. COMPETENCY OF JUROR—IMPRESSIONS AND OPINIONS—IMPARTIALITY.

A juror who says he has an impression or opinion as to guilt or innocence of defendant, formed from newspapers and rumors, that it would require evidence to remove it, but that it would yield to evidence, and that he can and will give the defendant a fair and impartial trial according to the evidence that may be adduced before him, is competent.

4. CRIMINAL TRIALS—READING INDICTMENT.

Where an indictment contains many counts, all alike, except as to amounts of money and dates of misapplication, it is sufficient to read one count in full to the jury, explain the difference, and state the amount and date charged in each of the other counts.

5. TWO INDICTMENTS—CASES CONSOLIDATED—NUMEROUS COUNTS—VERDICT.

One indictment in 36 counts charged defendant with aiding in the abstraction of 36 specified amounts of money, at 36 specified dates. Another indictment charged him with aiding in the misapplication of the same amounts, upon the same dates. The two were tried together, and the jury returned a verdict of "guilty as charged." *Held*, that the verdict was definite, certain, responsive to the issues, and not a double conviction, the sentence imposed by the court being imprisonment for a less term than the maximum under any one count.

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

The plaintiff in error, Louis Gallot, was indicted, tried, and convicted in aiding and abetting Louis Colomb, a bookkeeper in the Union National Bank, with the abstraction and willful misapplication of the moneys, funds, and credits of the bank. Two indictments were presented against him, which were subsequently consolidated and tried together. Each indictment contains 36 counts charging 36 separate and distinct offenses, and were drawn under section 5209 of the Revised Statutes of the United States, which is as follows: "Sec. 5209. Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority,

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issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten." In one indictment he is charged with the aiding and abetting in the abstraction of 36 specified amounts of the moneys, funds, and credits of the Union National Bank upon 36 specified dates. In the other indictment he is charged with aiding and abetting in the willful misapplication of the same amounts upon the same dates as charged in the first indictment. To each of the indictments Gallot filed a plea, pleading the death of Louis Colomb prior to any indictment as a bar against the trial of himself. Demurrers were filed to the pleas, and were sustained, and the pleas overruled. Gallot then filed demurrers to the indictment, again objecting to be tried upon the charges because of the death of Louis Colomb. These demurrers were overruled, and the case went to trial, resulting in a verdict of "guilty as charged." It now comes before this court on five bills of exceptions and twenty-six assignments of error.

J. R. Beckwith, for plaintiff in error.

J. Ward Gurley, for the United States.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

SWAYNE, District Judge, after stating the facts as above, delivered the opinion of the court.

By the nineteenth and twentieth assignments of errors it is set out that the court erred in permitting evidence as shown in bills of exceptions Nos. 2 and 3, which errors, it would seem, this court was expected to ascertain by a careful reading of over 60 pages of record, and an inspection of the questions and objections and the rulings of the court, and exceptions thereto taken by the defendant below, contained therein. By the twenty-third and twenty-fourth assignments of errors we are informed that the court below erred in its charge given to the jury in each portion thereof marked by lines in said written opinion and marked 1, 2, 3, 4, 5, 6, 7, 8, and 9, and shown in the bill of exceptions No. 5, and the court erred in refusing each of the several charges and instructions in Nos. 2 and 5 as shown in the bill of exceptions. Rules 10 and 11 of this court (21 C. C. A. cxi., and 78 Fed. cxi.) are as follows:

(10) "The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court."

(11) "The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge

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of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, the counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

The assignments of errors Nos. 19, 20, 23, and 24 being in violation of the above rules 10 and 11 of this court, we decline to examine and pass upon the questions attempted to be raised thereby.

The first nine, and the 15th, 16th, 17th, 18th, 22d, 26th, and 27th assignments of errors raise the question so often repeated in the record of the right of the defendant, Louis Gallot, to be tried, under section 5209, as an aider and abettor of Louis Colomb, who was then dead, and had not been indicted or prosecuted during his lifetime. The ingenious and able argument of counsel for plaintiff in error was interesting, and, had it not been for the statute (section 5209) in question, would be effective. He seemed to be thoroughly familiar with and dwelt at length on the decisions at common law, and even extended his argument to the consideration of accessories to crime both before and after the fact. Without attempting to review the numerous cases cited and commented upon, we think a consideration of the statute above quoted and some of the decisions relating thereto will dispose of the question. The act (section 5209) in question was passed by congress for the purpose of sustaining and protecting national banks created by and under its authority, and by its express language the crime charged is made a misdemeanor. Whether this was done to prevent persons charged with crime from availing themselves of the pernicious technicalities that had crept into the common-law decisions and practice in regard to principal and accessory, we are not now called upon to decide; but no one can question the authority of congress to make such classification, or the binding force of it in reference to the application of different rulings that belong thereto. Hence the able argument of counsel for defendant, both oral and printed, directed to the common-law decisions of principal and agent, does not apply to this case. Congress has established the offense here charged to be a misdemeanor, and he who aids or abets in committing such an offense can be tried independently as a principal, irrespective of the presence of the one he aided. The supreme court of the United States, in U. S. v. Gooding, 12 Wheat. 475, passes upon a similar statute, and declares:

"The fifth instruction turns upon a doctrine applicable to principal and accessory in cases of felony, either at the common law or by statute. The present is the case of a misdemeanor, and the doctrine, therefore, cannot be applied to it; for in cases of misdemeanor all those who are concerned in aiding or abetting, as well as in perpetrating the act, are principals. Under such circumstances there is no room for the question of actual or constructive presence or absence, for, whether present or absent, all are principals. They may be indicted and punished accordingly. Nor is the trial or conviction of any actor indispensable to furnish a right to try the person who aids or abets the act. Each, in the eye of the law, is deemed guilty as a principal. In the present indictment, the offense is in the third and fourth counts laid, by aiding and abetting, in the very terms of the act of congress. If the crime, there-

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fore, could be supposed to be of an accessorial nature, it is truly alleged, according to the fact, not merely according to the intendment of law. We do not consider that the terms 'aid' and 'abet,' used in this statute, are used as technical phrases, belonging to common law, because the offense is not made a felony, and therefore the words require no such interpretation. The statute punishes them as substantive offenses, and not as accessorial, and the words are, therefore, to be understood as in common parlance, to import assistance, co-operation, and encouragement."

The plaintiff in error in this case is indicted under a special statute (Rev. St. § 5209), and it is evident upon inspection of this statute that its spirit and purpose is to punish every president, officer, cashier, or agent, etc., and likewise to punish every person who aids or abets said officer or agent in any violation of the section. There is no difficulty about the definition of the word "aid," and "abet" is defined as follows: "To aid, countenance, encourage in, to incite, stimulate, or instigate to a criminal act." Therefore the purpose of this trial was to ascertain whether any such officer, clerk, or agent had violated the act, and whether Louis Gallot, the plaintiff in error, had aided him in doing so; not for the purpose of convicting the officer or agent, but for the sole purpose of ascertaining the guilt or innocence of the plaintiff in error; and the objection that Louis Colomb was dead, and had passed beyond the realm of human courts, so often repeated, without being indicted or tried, and that he could not now be tried because the presumption of his innocence that existed in his lifetime had followed and attached to his record after death, and that he could not be tried as a principal, therefore the question as to whether the plaintiff in error had ever aided him in the commission of such offense was beyond the power of the federal courts to determine, we think was not well taken. The offense charged against the plaintiff in error is a misdemeanor. He was properly tried under the circumstances, and he was the only person on trial; and the only necessity of inquiring into the record of the doings of Louis Colomb was to ascertain whether or not a crime had been committed, not for the purpose of convicting the said Colomb, but for the purpose of enabling the jury to determine whether or not the defendant below had aided in the commission of the offense as charged in the indictments. Plaintiff in error's rights on the trial as to the admission of evidence and in all other respects were equal to and as well protected as if Louis Colomb had been in court and on trial with him. He suffered no disadvantage from his absence, and had no right to complain because he was tried alone.

The next question of law raised by the 10th, 11th, 12th, 13th, and 14th assignments of error is to the competency of certain jurors impaneled in the case, on the ground that they had previous to the trial formed an impression from newspapers and rumors and other sources as to the guilt or innocence of the defendant. They also stated that these impressions and opinions would yield to evidence, and that they could and would give the defendant a fair and impartial trial according to the evidence that might be produced before them as jurors. Some of them stated that it would

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require evidence to remove their impressions. It will need but a short review of the cases on this subject to show that these objections are not well taken. In the state of Louisiana the supreme court, in the case of State v. Covington, 45 La. Ann. 979, 13 South. 266, in a short opinion announces the settled law of the state as follows:

"The juror against whom the objection is ruled answered on his voir dire, and stated that he had formed an opinion from conversing with one of the witnesses for the state, but that he could lay aside the opinion he had formed, and decide the case on the law and the evidence adduced on the trial. The defendant had exhausted his challenges when he challenged the juror for cause, which was overruled. The answer of the juror disclosed that he was a competent juror, that he was free from bias or prejudice, and his mind in that condition to impartially try the defendant. In the case of State v. Dugay, 35 La. Ann. 327, this court said: 'Our last researches on this point were suggested in the case of State v. De Rancé, 34 La. Ann. 186, in which we took occasion to make a thorough review of previous opinions on this subject, and in which we reaffirmed the rule, sanctioned in numerous cases, under which jurors who had formed and expressed opinions as to the guilt or innocence of the accused, but who asserted that they felt able to do impartial justice according to the law and the evidence in the case, were ruled to be competent jurors. We distinctly and emphatically reiterate that this is the correct rule, with the reasonable hope that it will be understood by the profession.' State v. Dent, 41 La. Ann. 1083, 7 South. 694; State v. Dorsey, 40 La. Ann. 740, 5 South. 26; State v. Ford, 42 La. Ann. 255, 7 South. 696; State v. Garig, 43 La. Ann. 365, 8 South. 934. The answer of the juror brings him within the rulings of the cases cited."

In Spies v. State, 123 U. S. 179, 8 Sup. Ct. 30, Chief Justice Waite, speaking for the court, says:

"In Reynolds v. U. S., 98 U. S. 145, we said 'that upon the trial of the issue of fact raised by' a challenge to a juror in a criminal case, on the ground that he had formed and expressed an opinion as to the issues to be tried, 'the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The findings of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. * * * It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not, in law, be deemed impartial. The case must be one in which it is manifest the law left nothing to the "conscience or discretion" of the court.' "

The language of the late Chief Justice Agnew of Pennsylvania is so appropriate, and expresses our views so correctly, upon this subject, in which some commendable progress has been made in this country during the last half century, that we adopt it in this connection:

"We must either recede, and go back to the practice of an age when ignorance of passing events constituted a characteristic of the time, and exclude every juror who has formed any opinion, even the slightest, or we must stand abreast with the present age, when every remarkable event of to-day is known all over the country to-morrow, and exclude those only whose opinions are so fixed as to be prejudgments, or have been formed on the known evidence in the case. It is needless to say the world moves and carries us with it, and if we lag behind we must commit the trial of the most important causes in life to those so ignorant their dark minds have never been smitten by the rays of intelligence." O'Mara v. Com., 75 Pa. St. 424, 428.

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The twenty-first assignment of errors is as follows:

"(21) The court erred in allowing the district attorney to state the indictments herein to the jury after partial reading thereof, as shown in bill of exception No. 1 herein."

It appears from the record that the first count of each indictment was read to the jury in full. Then it was explained to them that the only difference between the counts read and the remaining counts in the indictment was the respective amounts and dates, and the amount and date charged in each count was then stated in their respective order. This method gave the jurors a perfect and clear understanding of the contents of the indictments,—an understanding that would not have been improved by reading the whole of the indictments in full, with all of the legal verbiage contained therein,—and this was a method which in no way prejudiced the defendant, and gave him no cause of complaint. See Agnew v. U. S., 165 U. S. 44, 17 Sup. Ct. 235, and cases cited therein.

The remaining question of law raised by the twenty-fifth and part of the twenty-sixth assignments of error is that the verdict in the case was not responsive to the issues in the indictments, and was uncertain and indefinite, and was a double conviction on each and every specific sum named in the indictments. As we have already seen, the indictments in this case and the charges contained therein are clear and specific. The verdict of the jury is as follows: "New Orleans, June 29th, '97. We, the jury, find the defendant guilty as charged. Geo. Norton, Foreman." Briefly, it is as clear and positive and emphatic as the English language can express it, and it is in the usual, proper, and legal form. As to the question of double conviction, it has been abundantly established that a verdict of guilty upon the whole indictment must stand if any one of the counts is sustained by competent testimony; and the sentence imposed by the court of eight years in the penitentiary at Columbus, in the state of Ohio, being two years less than the maximum penalty that could have been imposed upon him upon any one count of the indictments, gives him no cause for complaint. For the reasons given in Gardes v. U. S. and Girault v. Same, 30 C. C. A. 596, 87 Fed. 172, the sentence imposed on the prisoner is modified by striking out the words "at hard labor," and, thus modified, the judgment appealed from is affirmed.

PARDEE, Circuit Judge (dissenting). While congress may have the power to make the aiders and abettors of national bank officials in the embezzlement and misapplication of bank funds principal offenders, and triable as such, yet in section 5209, Rev. St., it has not done so. This appears from the plain reading of the section, and is the construction given by the supreme court of the United States. In Coffin v. U. S., 162 U. S. 664, 669, 16 Sup. Ct. 943, 946, that court, in considering the proper construction of section 5209, says:

"However, the real premise upon which the whole argument rests, is that, if the accused was guilty at all, he was guilty as a principal, and not as an

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aider and abettor. But it is not necessary to give much time to the consideration of this claim, in view of the clear intent of congress as expressed in the statute under review. It is evident that, no matter how active the co-operation of third persons may have been in the wrongful act of a bank officer or agent, such third person is required to be charged as an aider and abettor in the offense, and prosecuted as such. The primary object of the statute was to protect the bank from the acts of its own servants. As between officers and agents of the bank and third persons co-operating to defraud the bank, the statute contemplates that a bank officer shall be treated as a principal offender. In every criminal offense there must, of course, be a principal, and it follows that without the concurring act of an officer or agent of a bank third persons cannot commit a violation of the provisions of section 5209. If, therefore, a violation of the statute in question is committed by an officer and an outsider, the one must be prosecuted as the principal and the other as the aider and abettor."

There is no warrant in the common law, nor in any statute of the United States, for indicting, trying, and convicting an accessory or aider and abettor, or a subordinate offender, when the principal offender dies before indictment and trial. In the same case the following instruction to the jury was approved:

"The burden of proving Haughey and the defendants guilty as charged rests upon the government, and this burden does not shift from it. Haughey and the defendants are presumed to be innocent until their guilt in manner and form as charged in some count of the indictment is proved beyond a reasonable doubt. To justify you in returning a verdict of guilty, the evidence should be of such a character as to overcome this presumption of innocence, and to satisfy each one of you of the guilt of Haughey and the defendants as charged, to the exclusion of every reasonable doubt."

Without warrant from the common law, and in the absence of statutory authority, and in the teeth of the presumption of innocence, how can a court and jury find a dead man guilty of a crime beyond a reasonable doubt? Congress has seen fit to declare the offenses denounced by section 5209 to be misdemeanors. All the same they are conceded to be infamous crimes, because of the punishment awarded, and offenders under the statute must be tried accordingly. It is submitted that if congress, by naming an offense, can place infamous crimes in the category of misdemeanors, congress can also provide for principal and subordinate offenders in misdemeanors, and intend that the trial and proceedings under the statute shall be according to the well-known and understood rules heretofore governing the trial of subordinate offenders. I do not deem it necessary to further elaborate my reasons. The exhaustive brief of the learned counsel for the plaintiff in error deals with this question in a masterly manner, and the convictions resulting from its study compel me to announce my very respectful dissent from the opinion and judgment of the court.

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(87 Fed. 453.)

UNITED STATES v. DEAN LINSEED-OIL CO.

(Circuit Court of Appeals, Second Circuit. April 7, 1898.)

No. 57.

1. CUSTOMS—DRAWBACK—LINSEED-OIL CAKE.
   Where linseed, on which a duty of 20 cents per bushel had been paid, was manufactured into oil and oil cake, and the oil cake exported, the drawback, under section 22 of the act of August 27, 1894, should be computed in proportion to the value which the oil cake bears to the oil, and not in proportion to the weight which the exported oil cake bears to the weight of the imported linseed. 78 Fed. 467, reversed.
2. SAME—MANUFACTURE—WASTE.
   Linseed-oil cake, manufactured from imported linseed, is not waste, but is a manufactured article, and was therefore entitled to the drawback provided by section 22 of the act of August 27, 1894 (28 Stat. 551).

Wallace, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of New York.

This is a writ of error to review a judgment of the circuit court for the Eastern district of New York in an action against the United States, which was brought under the provisions of section 3 of the act of March 3, 1887 (24 Stat. 505), known as the "Tucker Act." The material facts found by the circuit court are as follows: In December, 1894, the Dean Linseed-Oil Company, the petitioner, imported into the United States 11,944 bushels of linseed, or flaxseed, of 56 pounds each, and in that month, and in January, 1895, 23,704 other bushels of linseed, of 56 pounds per bushel, were imported into the United States, partly by the petitioner and partly by other persons, who transferred and delivered the same to the petitioner; and upon these importations the statutory duty of 20 cents per bushel was duly paid. Thereafter the petitioner, which is a corporation for the manufacture of products from linseed, manufactured said linseed into oil, and the by-product known as "oil cake," by the following process: The seed was crushed by being passed through iron rollers. The crushed seed was conveyed to a machine called a "mulling machine." In that machine, heated steam was introduced, and the pressed seed was subjected to the mulling process; that is, it was constantly stirred by revolving wheels. The process was continued until the crushed seed was softened and heated and moistened to a certain extent. It was then placed in screens of duck cloth; one screen being placed above the other, and duck cloths over each screen when filled. These screens were fitted into an hydraulic press, and the arrangement was such that by means of the hydraulic press the oil was pressed, and ran out into troughs or vessels, and was thence conveyed to tanks, where it was allowed to settle. What remained in the press was the oil cake, one cake being the result of the pressure of each of these screens to the form. The edges of the cake were trimmed. It was then piled or corded so that it might dry out, and it was then placed in bags, which were properly marked, and it was then ready to be used. The oil product, after settling, was barreled, and was ready for use. Of the matter composing each bushel of seed, weighing 56 pounds, 35.87 pounds appeared in the cake, and 19.91 pounds appeared in the oil. The treasury regulations of March 29, 1895, state (and the accuracy of the statement seems to be conceded) that the average value of imported oil seed is $1.62 per bushel of 56 pounds, and that from a bushel of linseed 2.654 gallons of oil are obtained. The value of the oil cake exported by the petitioners was about $21 per ton of 2,000 pounds, and the value of the linseed oil extracted from the imported seed was 52 cents per gallon. From a bushel of linseed, 35.87 pounds of oil cake are obtained. Thereafter the petitioner exported to England the cake made from said different importations, and presented to the collector of customs at New York a claim or claims for the drawback alleged to be allowed by law on the

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cake so exported. All the requirements imposed either by the statute or by the regulations of the secretary of the treasury were complied with. Section 22 of the tariff act of August 27, 1894 (28 Stat. 551), provides as follows: "Where imported material on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties." A similar section first appeared in section 4 of the act of August 5, 1861 (12 Stat. 293), and was section 3019 of the Revised Statutes, and was contained in the tariff act of 1890; but in the tariff act of July 14, 1870 (16 Stat. 263), it was provided, in the paragraph imposing a duty upon linseed, that no drawback should be allowed on oil cake made from imported seed, and this proviso was continued in the paragraph of each tariff act which imposed a duty upon linseed, until the act of 1894, in which it was omitted. The circuit court found that the number of articles affected by the construction of the law allowing drawbacks, where several articles are manufactured from one imported material, is very great; that among them are castor oil and castor pomace, tin plate, locomotives, glass, wire, refined sugar, and syrup which comes from imported raw sugar and refined sugar, and syrup which comes from imported molasses, articles manufactured from tin plate, and articles manufactured from wool, and cleaned rice manufactured from uncleaned rice, and bags made from imported material. From August 5, 1861, down to the present time, the practice of the treasury department, where several articles were manufactured from the same imported material, has always been to calculate and to pay the drawback by distributing the duty paid on the imported material between such articles in proportion to their values, and not in proportion to their weights, as well where the imported material paid a specific as where it paid an ad valorem duty. Such calculation and payment have been under treasury regulations. This question was established after investigation, in 1861, into the values of the various products of raw sugar, of linseed, and of other imported articles. After the provision of the act of 1894, by which a drawback upon oil cake was no longer prohibited, the treasury department issued a regulation, dated March 29, 1895, which instructed collectors to act in accordance with the general practice, and, taking the portion of the imported seed resulting in the oil cake at 35.87 pounds per bushel, and first ascertaining the value of such cake, to calculate the drawback as being such proportion (less 1 per cent.) of the duty paid on the seed as the value of the oil cake was to the value of the oil and oil cake. The collector estimated, in accordance with these instructions, the amount of drawback which was due to the petitioner, and found the aggregate to be $1,498.46, and tendered to the petitioner debenture certificates for that amount, which it did not accept. If the drawback should be computed in proportion to weights, the aggregate upon the oil cake would be $4,521.07. The petition was brought to recover that sum, and judgment was rendered in its favor for that amount.

James Byrne and Robert H. Roy, for the United States.
S. B. Clarke and Elihu Root, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts as above). The immediate question in this case is, shall the total drawback, less the 1 per cent. retained by the government, be divided between the oil and the oil cake in proportion to their weight or their value? Inasmuch as the duty is imposed by weight, the petitioner contends that the drawback shall be divided by weight. The decision depends upon the construction which shall be given to a general statute which has a very large class of articles within its scope, and therefore is an important statute both to the manufacturer and to the government. When an imported material, upon which duties have been paid, is manufactured into two separate products, the

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statute is silent as to the proportion in which the drawback shall be divided among the respective products. A court, therefore, is permitted to adopt the construction of the statute or the method of division which shall seem to it the most reasonable and just, and therefore the one most in accordance with the probable intention of the legislation. It will be seen, by a glance at the list of articles heretofore given which are affected by the statute in regard to drawback, that, from many imported articles upon which duties are paid by weight, two or more products of different values are manufactured, and that the principal product, and the one of chief value, is often light in weight, while the secondary or by-product is bulky, but cheap. This is noticeable in the products from the castor bean, from sugar, and from tin plate. From a bushel of linseed, 2.6 gallons of oil are produced, which used 19.91 pounds of the bushel, and are worth at least $1.36, while 35.87 pounds appeared in the by-product of cake, which is worth a fraction over 1 cent per pound. If the duty of 20 cents per bushel is divided according to weight, each pound will pay $^5/_{14}$ of a cent, and the cheap and bulky secondary product will receive a drawback far disproportionate to its value. This seems unreasonable, and there is also a lack of equity towards the government, in compelling it to return a drawback by the pound upon an article which sells at $21 by the ton. The purpose of the drawback provision is to make "duty free imports which are manufactured here and then returned" to some foreign country. Campbell v. U. S., 107 U. S. 407, 2 Sup. Ct. 759. The manufacturer from imported seed, who sells his linseed oil in this country, and exports his oil cake, if he receives his drawback on the oil cake by weight, receives an unreasonably large amount of return duty, as between the oil which he sells in this country and the oil cake which he exports. He keeps in this country the valuable part of his imported article, he returns the nonvaluable part, and receives about $^{13}/_{20}$ of the duty. The same lack of equity would show itself in the case of each by-product throughout the list of manufactured articles which are entitled to be a drawback. The uniform practice of the treasury department, since 1861, has been, where several articles were manufactured from the same imported material, to pay the drawback by distributing the duty paid between the manufactured articles in proportion to their values, whether the original duty was specific or ad valorem. It is true that the drawback on oil cake did not exist between 1870 and 1894, but the general statute existed, and was applicable to a large number of manufactured articles. The importance of adherence to a long-continued and reasonable construction of a statute by the officers of the department whose duty it has been to execute it, when the statute is of an ambiguous character, has been frequently commented upon by the supreme court ever since the case of Edwards v. Darby, 12 Wheat. 206, in which the court said:

"In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."

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The uniform construction of the treasury department seems to us reasonable, and equitable to the importer and the government.

The government makes the point that the petitioner is not entitled to any drawback, because oil cake is not a manufactured article, but is waste. The supreme court, in Campbell v. U. S., supra, which was an action to recover drawback upon linseed-oil cake, proceeded in their opinion upon the undisputed theory that it was a manufactured article; and it has been recognized as such by the treasury department from 1861, whenever it was not withdrawn by legislation from the statute in regard to the drawback. The article is a different thing from the tobacco scraps or tobacco clippings, which in Seeberger v. Castro, 153 U. S. 32, 14 Sup. Ct. 766, were held not to be a manufactured article; not being fit for use in the condition in which they were imported, except for a new manufacture. The petitioner is therefore entitled to the amount found due by the collector, viz. $1,498.46. The judgment of the circuit court is reversed, and the case is remanded to that court, with instructions to enter a new judgment for the petitioner in accordance with this opinion, and for the costs permitted by the act of March 3, 1887.

(April 20, 1898.)

WALLACE, Circuit Judge (dissenting). I am unable to concur in the judgment in this cause.

Imported materials, viz. "linseed," were used in the production here of two manufactured articles, viz. linseed oil and oil cake. The plaintiff, upon exporting the oil cake produced from a given number of pounds of the imported linseed, was entitled to a drawback, under the provisions of section 22 of the act of congress of August 27, 1894, which provides as follows:

"Where imported materials, on which duties have been paid, are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties."

Upon the linseed used in the oil cake the plaintiff had paid a duty of 20 per cent. for every 56 pounds, amounting to $4,521.09. According to the judgment of the court, the plaintiff is entitled to a drawback of only about 6 per cent. for every 56 pounds, amounting to $1,498.46, upon the theory that it is to be allowed, not upon the number of pounds of the linseed used in the oil cake, but pursuant to a mathematical formula adopted by the treasury department. The statute gives no sanction for such a mode of computing the drawback. The only inquiry which it permits is as to the quantity of the imported material in the exported article and the duty originally paid thereon. The mathematical formula which has been applied cannot possibly lead to a result which satisfies the statute.

It is true that between 1861 and 1870, while a similar statute was in force, it was the usage of the officers of the treasury department to compute the drawback according to this formula, but the case is not one for the application of the rule that where a statute is am-

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biguous the practical interpretation given by the executive officers charged with its administration is entitled to great weight. The statute is not ambiguous, but is as plain as language can make it.

In my opinion the judgment of the court below was correct, and should be affirmed.

(87 Fed. 457.)

COFFMAN v. CASTNER et al.[1]

(Circuit Court of Appeals, Fourth Circuit. May 3, 1898.)

No. 231.

TRADE-MARKS AND TRADE-NAMES—GEOGRAPHICAL NAMES—"POCAHONTAS COAL."

No one has, or can acquire, the exclusive right to use the name "Pocahontas," as descriptive of either the locality or character of coal mined in what is known as the "Great Pocahontas Coal Field of Virginia and West Virginia," but all producers of coal in that section have the right to so use it in common, as the extensive product of that region has become widely known as "Pocahontas Coal." [2]

Appeal from the Circuit Court of the United States for the District of West Virginia.

This was a suit in equity by Samuel Castner, Jr., and Henry B. Curran against W. H. Coffman to restrain defendant from alleged wrongful use of a trade-name. There was a judgment for plaintiffs, and the defendant prosecutes this appeal.

S. C. Graham, for appellant.

Arthur v. Briesen (J. Walter Douglass and Henry E. Everding, on the brief), for appellees.

Before GOFF, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

GOFF, Circuit Judge. This is an appeal from an order of the circuit court for the district of West Virginia entered on the 5th day of May, 1897, in the chancery cause of Samuel Castner, Jr., and Henry B. Curran, trading under the firm name of Castner & Curran, against W. H. Coffman, doing business under the name and style of Pocahontas Coke & Coal Company, and also as W. H. Coffman Coke Company. By such order the defendant below (appellant here) was in his own name, and in the name of the Pocahontas Coke & Coal Company, and also as the W. H. Coffman Coke Company, together with his servants, attorneys, and associates, restrained and inhibited from using the name "Pocahontas" or "Pocahontas Flat Top" in connection with his business, the court being of the opinion that "the complainants have a right to use the said word 'Pocahontas' for the purpose of indicating that the coal was from the Pocahontas field, and that they have the sole right to use said word as indicating the character of coal

[1] Rehearing denied May 10, 1898.

[2] As to the use of geographical names as trade marks and names generally, see note to Hoyt v. J. T. Lovett Co., 17 C. C. A. 657.

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they sell." From this decree the defendant below, under the provisions of section 7 of the act approved March 3, 1891, entitled "An act to establish circuit court of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," sued out this appeal.

The bill alleges that about the year 1882, in the state of Virginia, a tract or field of smokeless bituminous or semibituminous coal was opened and mined by the Southwest Virginia Improvement Company, a corporation organized and doing business under the laws of the state of Virginia; that shortly thereafter, but still in the year 1882, the said corporation named their mine "Pocahontas," and began selling the coal therefrom as "Pocahontas" coal, having adopted the trade-mark "Pocahontas" as designating its said output; that prior to the 1st day of January, 1884, Castner & Co., Limited, a partnership formed under the laws of the state of Pennsylvania, did purchase from the said Southwest Virginia Improvement Company the coal so mined, and did ship and sell the same principally at tide-water points under the name of "Pocahontas" coal; that they, as such partnership association, dealt in, inspected, shipped, and sold from said region or field as "Pocahontas" coal in large quantities, and under the license of the Southwest Virginia Improvement Company advertised, shipped, and billed the same "Pocahontas" coal, uniformly designating it as such coal; that in the year 1889 the complainants became the successors and assigns of said Castner & Co., Limited, and continued the same business under the name of Castner & Curran, dealing in and selling large quantities of said coal under the trade-mark designation of "Pocahontas" coal, shipping, billing, and advertising the same as "Pocahontas" coal, and as "Pocahontas Flat Top" coal, and that they, by reason of the careful inspection and purification of their coal, greatly increased from year to year the sale of the same; that complainants and their predecessor, Castner & Co., Limited, from the year 1883 until the bringing of this suit, during the first 12 years thereof with the license of the Southwest Virginia Improvement Company, and thereafter as owners of the said trade-mark, uninterruptedly carried on said coal business, and have continuously inspected, shipped, and sold large quantities of coal under the said trade-mark of "Pocahontas"; that on April 1, 1895, by an assignment in writing duly executed by the Southwest Virginia Improvement Company, the complainants became the owners of the entire right and title, interest and good will in and to the trade-mark "Pocahontas," with the exclusive right to use said word as a designation for all coal thereafter sold by them from said field, and became vested also with the exclusive right to sue and recover for all gains, profits, and damages arising out of past, present, or future infringements of the same; that they have devoted much time and expended large sums of money in inspecting, selecting, grading, and maintaining the superior quality and purity of the said coal, whereby it has acquired, and now possesses, a great reputation in the markets of the world under the name of "Pocahontas" or "Pocahontas Flat Top" coal, and that it has been and is now much sought after by dealers and the public; that complainants have the sole and exclusive right to the use of the word-symbol "Poca-

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hontas" as a trade-mark for coal, and that it is of great value to them in their business. It is also set forth in the bill that the public and the dealers in coal have generally acquiesced in complainants' exclusive rights to such use, and that they have not knowingly permitted the unlawful use of such trade-mark by others; that prior to November 1, 1896, complainants controlled the output of the various collieries in what is known as the "Great Flat Top Coal Region," including the Indian Ridge Coal & Coke Company; that they sold so much of this output as came up to the grade of "Pocahontas" coal in quantity, purity, and size as "Pocahontas" coal, but that the output of the Indian Ridge Company was impure, and required special care and attention, and yielded but a small proportion of the "Pocahontas" coal, as it was marketed by complainants; that the defendant, W. H. Coffman, is a factor or agent engaged in the sale of coal and coke at Bluefield, W. Va., and elsewhere, selling and advertising for sale bituminous and semibituminous coal from the Indian Ridge colliery, which is inferior in quality and purity to the coal sold by complainants, and is not of the standard as to quality and purity established by them; that he, intending to deceive dealers and the public, and to cause purchasers of his coal to believe that the same was sold by complainants, or is of the quality sold by them, has at Bluefield and elsewhere offered for sale and sold a very inferior and impure coal under the name and designation of "Pocahontas," and has, in advertising and selling the same, used the word-symbol "Pocahontas," and in letters, notes, and bills has displayed the words "Pocahontas Coal," or "Pocahontas Flat Top Coal," whereby the purchasers of his coal are liable to be and will be deceived, and caused to purchase defendant's coal as that sold by complainants; that as a matter of fact purchasers have been so deceived, and that the reputation of "Pocahontas" coal has been thereby tainted; that the defendant intends to and will continue so to do, unless prevented by the order of the court below. Other statements in the bill are not referred to, the same being unnecessary so far as the questions we are now to consider are concerned. A large number of affidavits were filed by complainants and defendant, which, as well as the answer of the defendant, treated as an affidavit, and the exhibits with it, and the bill, were read and considered by the court in disposing of the motion for an injunction.

Certain propositions of law, now well established, applicable to this case, will be referred to in the outset as guiding us in our investigation of the same, and as plainly indicating, in connection with the facts as we find them, the result we now announce. A trade-mark is intended to designate the origin of the particular article to which it is affixed, or to which it specially refers, and it gives notice to the world who the producer of that article was. A name may be used for this purpose, or a certain mark or peculiar device may be employed, provided they have not theretofore been appropriated by others for the same purpose. But the right to select such names, marks, and devices is governed by certain rules and limitations which have been found and announced by the courts. On this point the supreme court of the United States in Canal Co. v. Clark, 13 Wall. 311, 323, said:

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"The trade-mark must therefore be distinctive in its original signification, pointing to the origin of the article, or it must have become such by association; and there are two rules which are not to be overlooked: No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured, rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection. As we said in the well-considered case of Amoskeag Mfg. Co. v. Spear, 2 N. Y. Super. Ct. 599: 'The owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any word, letters, figures, or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. He has no right to appropriate a sign or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose.' And it is obvious that the same reasons which forbid the exclusive appropriation of generic names, or of those merely descriptive of the article manufactured, and which can be employed with truth by other manufacturers, apply with equal force to the appropriation of geographical names, designating districts of country. Their nature is such that they cannot point to the origin (personal origin) or ownership of the articles of trade to which they may be applied. They point only at the place of production, not to the producer; and, could they be appropriated exclusively, the appropriation would result in mischievous monopolies. Could such phrases as 'Pennsylvania wheat,' 'Kentucky hemp,' 'Virginia tobacco,' or 'Sea Island cotton' be protected as trade-marks; could any one prevent all others from using them, or from selling articles produced in the districts they describe under those appellations,—it would greatly embarrass trade, and secure exclusive rights to individuals in that which is the common right of many. It can be permitted only when the reasons that lie at the foundation of the protection given to trade-marks are entirely overlooked. It cannot be said that there is any attempt to deceive the public when one sells as Kentucky hemp or as Lehigh coal that which in truth is such, or that there is any attempt to appropriate the enterprise or business reputation of another who may have previously sold his goods with the same description. It is not selling one man's goods as and for those of another. Nothing is more common than that a manufacturer sends his products to market, designating them by the name of the place where they were made. But we think no case can be found in which other producers of similar products in the same place have been restrained from the use of the same name in describing their goods. * * * It is only when the adoption or imitation of what is claimed to be a trade-mark amounts to a false representation, express or implied, designed or incidental, that there is any title to relief against it. True it may be that the use by a second producer, in describing truthfully his product, of a name or a combination of words, already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product; but if it is just as true in its application to his goods as it is to those of another who first applied it, and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth."

In the same case it was held that the word "Lackawanna," the name of a section of the state of Pennsylvania, could not be combined with the word "coal," and made a trade-mark which would be protected by law, for the reason that every one who mined coal in the valley of the Lackawanna was entitled to the right of representing it as coming from that region, and as being Lackawanna coal.

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In Mill Co. v. Alcorn, 150 U. S. 460, 466, 14 Sup. Ct. 151, the supreme court says:

"The appellant was no more entitled to the exclusive use of the word 'Columbia' as a trade-mark than he would have been to the use of the word 'America,' or 'United States,' or 'Minnesota,' or 'Minneapolis.' These merely geographical names cannot be appropriated, and made the subject of an exclusive property. They do not, in and of themselves, indicate anything in the nature of origin, manufacture, or ownership; and in the present case the word 'Columbia' gives no information on the subject of origin, production, or ownership."

In the same case it was said:

"These cases establish the following general propositions: (1) That to acquire the right to the exclusive use of a name, device, or symbol as a trade-mark it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached, or that such trade-mark must point distinctively, either by itself or by association, to the origin, manufacture, or ownership of the article on which it is stamped. It must be designed as its primary object and purpose, to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others. (2) That if the device, mark, or symbol was adopted or placed upon the article for the purpose of identifying its class, grade, style, or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid trade-mark. (3) That the exclusive right to the use of the mark or device claimed as a trade-mark is founded on priority of appropriation; that is to say, the claimant of the trade-mark must have been the first to use or employ the same on like articles of production. (4) Such trade-mark cannot consist of words in common use as designating locality, section, or region of country."

In Laughman's Appeal, 128 Pa. St. 1, 18 Atl. 415, it was held that when the article to which a geographical name is applied is the product of the place named, the term cannot be used as a trade-name by one to the exclusion of others, owners of like products of the same place; hence the term "Sonman," which has received a distinct geographical recognition from the public, it being the name of a large boundary of land containing a number of private estates owned by different persons, all of whom are engaged in the same business of mining and shipping coal, and having within its limits a village of the same name, cannot be appropriated by one of such persons as a trade-name to the exclusion of the others, although the tract is not an independent region, and cannot be considered a separate coal basin or subbasin.

In the case of Iron Co. v. Uhler, 75 Pa. St. 467, the court said:

"Glendon is the name of the town in which the business of each party is located and carried on. It is an incorporated borough. Being, then, the name of an incorporated town, the main question is whether the appellant lawfully has the exclusive right to use it as a trade-mark. It is conceded, as a general rule, that the name of a town or city cannot be so appropriated as the exclusive property of any one. This view is well sustained by authority. High, Inj. 673; Bisp. Eq. 411; Wolfe v. Goulard, 18 How. Prac. 64; Lead Co. v. Masury, 25 Barb. 416; Newman v. Alvord, 49 Barb. 588; Candee v. Deere, 54 Ill. 439; Canal Co. v. Clark, 13 Wall. 311. It is contended by the appellant that this case is taken out of the general rule, inasmuch as the trade-mark was adopted prior to the incorporation of the borough, and before there was any town at that place. No authority is cited which supports this distinction. The case of Woterspoon v. Currie, 23 Law T. 443, is clearly distinguishable. It is known as the 'Glenfield Starch Case.' It is true, the injunction was there granted, but the com-

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plainant and respondent were not both engaged in carrying on the business in the same town or city. There was no town—no city—there. The lord chancellor says: 'Glenfield is not a town; * * * it is not a parish; it is not a hamlet; it is not a district of any special character; but it was an estate of that name upon which some people seem to have erected some houses or manufactories, and upon which now some sixty people are living.' It will not do to apply to an incorporated borough in this state the same rule that may be applicable to an estate in England. Such a borough is essentially of a public nature; the estate is of a more private character. The name which an individual may give to his estate is unlike that which legislative sanction has given to a municipal corporation. The rights of the public in each are radically different. The appellees did not falsely represent the place of their business location. Their pig iron was actually manufactured within the borough of Glendon. * * * The appellees put upon their pigs the initials of their firm and the name of their town. That name was Glendon to the whole world. It cannot be that the previous appropriation by the appellants of the word which now is the name of the town prevents any other manufacturer of pig iron, within its limits, from using the same word. If it be so now, it may continue through all coming time. The boundaries of the town may be enlarged. The borough may grow into a city. The manufactories of pig iron may be multiplied, yet the word most expressive to indicate their location must be denied to all, save one. * * * We see nothing in the facts of this case, even as found by the master, to take it out of the general rule which denies to one the exclusive use as a trade-mark of the name of the town in which the same kinds of goods are manufactured by others."

In Connell v. Reed, 128 Mass. 477, Chief Justice Gray says:

"Although the master reports that there was no evidence that any other person than the plaintiffs or their agents had ever used these words ["East Indian"] in connection with the manufacture and sale of medicines, it is at least doubtful whether words in common use as designating a vast region of country and its products can be appropriated by any one as his exclusive trade-mark, separately from his own or some other name in which he has a peculiar right."

In the case of Evans v. Von Laer, 32 Fed. 153, Judge Colt held that, as Montserrat was the name of an island in the West Indies from which both the plaintiff and defendant imported lime juice, the former, in the absence of fraud, was not entitled to the exclusive use of the word "Montserrat" as a designation for lime juice, even though the plaintiff's article may have acquired a high reputation for purity and strength, while that of the defendant was of an inferior quality.

In Salt Co. v. Burnap, 20 C. C. A. 27, 73 Fed. 818, 43 U. S. App. 243, 250, the court said:

"It is well settled, and we have just had occasion to decide in this court, that words merely descriptive of the character, quality, and composition of the article or of the place where it is manufactured or produced cannot be monopolized as a trade-mark. California Fig Syrup Co. v. Frederick Stearns & Co., 43 U. S. App. 234, 20 C. C. A. 22, and 73 Fed. 812; Chemical Co. v. Meyer, 139 U. S. 540, 11 Sup. Ct. 625; Canal Co. v. Clark, 13 Wall. 311. The name 'Genessee,' when used in connection with the complainant's salt, obviously refers to the place of its production. The complainant could, therefore, assert no trade-mark property in it."

In the case of Candee v. Deere, 54 Ill. 439, the court held that there can be no trade-mark in the words "Moline Plows," as Moline was the name of the town in which the plows were made, and said:

"Is it possible—can it be tolerated for a single moment—that a maker of plows at Moline shall not be permitted to sell his work as a Moline plow;

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to advertise them in every form as the Moline plow? Would it not be the truth; and shall a manufacturer be prevented from publishing to the world where his wares are made? * * * Any number of plow makers can go with impunity to Moline, and establish there plow factories, and brand on their plows their own name and the name of the town, and send them broadcast over the country, to the joy of our farmers, and to the common benefit of all."

These cases firmly establish the questions of law applicable to the contention we are now to dispose of, and they clearly indicate the result we have reached. A geographical name cannot be appropriated to the exclusive use of any person or company as a trademark, and, if adopted as such, it must be used subject to the right of others doing business in the section of country to which it applies to make like use of it in matters properly pertaining to their business in that locality.

It is clear from the evidence that "Pocahontas" is a word of well-known geographical signification, denoting that large and valuable section of the Virginias famed the world over for the remarkably valuable and useful coal and coke that it produces. Prior to 1882 this region was comparatively unknown, and entirely in the primeval state in which nature had left it, constituting a part of the Great Flat Top Mountain portion of southwest Virginia and of southeast West Virginia. In the years immediately preceding 1882 this wilderness had been sought out and explored by those who represented the capital and energy by which it was afterwards developed. The experts sent into its theretofore hidden recesses returned with the report of its fabulous wealth and wonderful possibilities. The result was the extension of the Norfolk & Western Railroad into and through the Great Flat Top region, and the organization of the Southwest Virginia Improvement Company, under whose auspices the mines were opened and coal was first shipped. The development inaugurated by this company was commenced during the fall of 1881, continued in the year 1882, and the railroad was completed to the mines in the springtime of the year 1883. The town located at the point where the first mine was opened was early in the year 1882 named Pocahontas, and the post office which was established by the department at Washington on the 30th day of June, 1882, was likewise then called by the same name. The first coal shipped to the tide-water markets left the mines in July, 1883, and it was billed and sold as "Pocahontas" coal. The entire field is now known as the "Pocahontas" and the "Pocahontas Flat Top Coal Field." It embraces large portions of Tazewell and Wise counties in the state of Virginia, and of Mercer, McDowell, Wyoming, and Raleigh counties in the state of West Virginia. It is divided into three sections or working divisions,—the Pocahontas, which includes all the mines around the town of Pocahontas; the Bluestone district, embracing the improvements on the Bluestone river; and the Elkhorn, the country in McDowell county on the Flat Top Mountain. The coal shipped from all this section is known in the markets of the world as "Pocahontas" coal, evidently so called from the town of that name in which the first mine was located, and from which the first shipments were made. The coal beds are above the water level, and

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range from 5 to 13 feet in thickness, extending through an area of about 500 square miles, or 320,000 square acres. An actual survey of the outcrop of this field discloses that about one-third of the territory is barren, and that there are near 213,000 square acres underlaid with the Pocahontas vein of coal. A moderate estimate gives to each square acre 10,000 tons of marketable coal, or say 2,130,000,000 tons. At the time when this suit was instituted 38 different coal and coke campanies were operating in the field, all of them advertising, mining, and selling the coal excavated from the Pocahontas vein, and known as the "Pocahontas Flat Top Coal." For the manufacture of coke over 5,000 ovens had been constructed and were in use. During the year 1883, 99,871 tons were mined, the output in the following years rapidly increasing, until in 1894 3,888,058 tons were sent to market. For the purpose of illustrating the almost inexhaustible resources of the field, it may be stated that at this rate of production—as shown by the returns for the year 1894—it would require about 548 years to exhaust the seam now being worked. And it is as to this entire body of coal that the complainants claim the exclusive right to use the word "Pocahontas," as descriptive of its origin and quality.

There is no evidence to sustain the allegation in the bill that the Southwest Virginia Improvement Company began selling coal in the year 1882 from the Pocahontas Mine, nor that it made any sales of "Pocahontas" coal in the year 1883, in the sense that those words are used as a trade-symbol. Nor is there any satisfactory evidence tending to show that said company adopted and used a trade-mark, or made any effort to establish one as such, prior to the year 1885. It is true that in the assignment made by the Southwest Virginia Improvement Company to the complainants it is recited that said company "did adopt, on or about the 1st day of July, 1882, as a trade-mark, the word-symbol 'Pocahontas'"; but surely that statement in such a paper, made under the date of April 1, 1885, cannot be considered as proving that fact, and the record has been searched in vain for testimony establishing it. The first coal sent to market, according to the evidence, was in July, 1883, at which date both the town of Pocahontas and the post office of the same name had been in existence for a year at least. The claim of complainants that the town had no existence until January 31, 1884, the date of the act of the Virginia legislature incorporating it, and that, therefore, it was not known legally, in a geographical sense, prior to such date, is not, in the light of the testimony, and in connection with the important questions herein involved, entitled to the consideration given it by counsel. There can be no doubt but that at the time the first shipment of coal was made by the Southwest Virginia Improvement Company, the town of Pocahontas was in existence, the post office had been established, and that the coal itself was sent from the station of that name. The word "Pocahontas" then denoted the locality at which the article in which the company was dealing was mined, as well as the point from which it was shipped, and it also indicated in business matters the natural product of all that region. It follows, therefore, that it could not

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then be used as an exclusive trade-mark, and as a matter of fact it was not so employed until some time thereafter. We are impelled to find from the testimony that in the early shipments of coal the word "Pocahontas" was used, not as a word-symbol or trade-mark, but simply as the name of the town from whence it came, for the purpose only of pointing out the place of production. The coal had not then been used, and it had not produced the wonderful results that it subsequently did. Its reputation had not been made, and it had not at that time found its way to the marts of the world, to the furnaces of land and sea. The operators of that section and their vendees, including complainants' predecessors, had not then been given the opportunity to inspect, grade, and purify it, so as to make it typify the high degree of excellence that it now enjoys, and there is no evidence tending to show that selection and inspection were then resorted to, other than is usual in all mines. The first direct evidence bearing on the trade-mark is the application of August 25, 1885, made by Castner & Company, Limited, to register the word "Pocahontas," at the United States patent office. Such registered trade-mark is not now relied upon by complainants; why we have not been advised, but likely for reasons connected with the decision of the supreme court in the Trade-Mark Cases, 100 U. S. 82. It is, however, worthy of notice that such application was made under the provisions of section 4937, Rev. St. U. S., which require the party so applying to set forth in the statement made by him the length of time, if any, during which the trade-mark had been in use, and that said applicants in their statement so filed used this language: "This trade-mark has been used continuously by said corporation since about January 1, 1885." The word-symbol or device now claimed by complainants as a trade-mark is founded on the rule of the common law that the person or company first employing it to distinguish the goods made or sold by the owner thereof is entitled to the benefits arising from its exclusive use. The chancery courts of England and of this country have long recognized this privilege, and have enforced it, if the property right of the claimant thereto has been duly established.

As we see this case, the complainants are not entitled to the exclusive right to use the word "Pocahontas," as descriptive of either the locality, or character of the coal mined in the Pocahontas coal field, but all of the producers of that product in that section have the right to so use it in common with complainants. That word has acquired a generic meaning, and from the evidence before us it is clear that in the business world it is used to indicate the place where the coal is produced, and that it does not point to either the producer or the vendor of the same. All the mine owners who, by their labor, succeeded in establishing their industries in that section, have the right to use in their business the geographical word which is the recognized designation of the same, and that points to the product peculiarly indicative of its wealth; and surely it cannot be that any one of them can inhibit all the rest from exercising the privilege, which was the birthright of the section, and is an advantage common to all who are interested in it. To give to the complainants

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below the exclusive right they claim in their bill would be to ignore the principle that is the foundation of the protection given to trade symbols and marks.

There remains yet one other allegation of complainants' bill to be considered, and that is the charge that the defendant below, intending to deceive dealers in coal and the public in general, unlawfully offered for sale and sold a very inferior article of coal under the name of "Pocahontas"; that purchasers of the same were liable to be and were misled, and were induced to buy it, as the superior and selected grade usually sold by the complainants; and that thereby the public was deceived, and the reputation of the coal sold by complainants was injured. It is undoubtedly true that complainants, as producers and sellers of coal from the "Pocahontas coal fields," are, with all other producers and mine operators in that region, interested in maintaining the purity and reputation of the natural product of the same, and that they may cause the defendant or any one else to be inhibited and restrained from selling, or offering to sell, an inferior coal from another region as the coal mined in the Pocahontas field. This they can do independent of the question of trade-mark, or of their right to the exclusive use of one. This allegation that the defendant has been engaged in unfair and fraudulent trade is not supported by the evidence. It has been shown that he was advertising and selling "Pocahontas" coal, but the testimony also shows that the coal he so advertised and sold was in fact from the "Pocahontas coal field." It follows that the representations made by him were neither fraudulent nor untrue, and that he had a lawful right to so advertise and sell. It nowhere appears that he ever represented to the public that he was selling the same article sold by complainants, except as their coal was comprehended by the word "Pocahontas," which also justly described his own. He sold the product of the Browning Mine, which is located adjoining the original mine of the Southwest Virginia Improvement Company, in the town of Pocahontas, the coal from which is now disposed of by the complainants, as "Pocahontas" coal; and it is proven that both collieries excavate from the same vein. As to the right of the Browning Mine, one of the oldest in the field, to sell its product as "Pocahontas" coal, there can be no doubt, and it would be unconscionable to deny it. He also sold from the Indian Ridge Mine, which is located within the "Pocahontas coal field," and it is shown that the complainants are now selling the output of the Rolfe and Arlington Mines as "Pocahontas" coal, both of which adjoin the Indian Ridge Mine. The complainants themselves formerly sold the coal from this mine as "Pocahontas" coal, and it is really difficult to understand why it becomes another article in the hands of the defendant. It is also set forth in the bill that the coal from the Indian Ridge section does not grade as high as that from other portions of the field, and that it had not been carefully inspected by the defendant before it was sold. But the evidence does not sustain this claim, and it appears that the complainants themselves have endeavored to again secure the right to sell this coal as "Pocahontas" coal since it has been so sold by the defendant, and we cannot believe that they

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would have made this effort had the grade of the product been inferior, or its inspection careless.

The proof does not show that the appellant has practiced any deception upon the public, or that he has perpetrated any fraud upon the appellees. The appellant advertised and was selling coal obtained from the Browning and Indian Ridge Mines, of the "Pocahontas Flat Top region," and he did not represent it as purchased from the appellees, nor as mined by them. He has represented it as coal from the "Pocahontas" field, and it was in fact such coal. He has made no false representations, and he has invaded no right to which the appellees can properly assert a claim. There is error in the decree appealed from, and it is reversed, and this cause is remanded to the court below with instructions to dismiss the bill. Reversed.

On Rehearing.

(May 19, 1898.)

Richard C. Dale and Henry E. Everding, for petitioners.

GOFF, Circuit Judge. The court has duly considered this petition for a rehearing, and it is ordered that the mandate issue as heretofore directed. The opinion filed in this cause on the 3d day of May, 1898, found error in the decree appealed from, not, as stated in the petition for a rehearing, solely because the complainants below had failed to prove material allegations of their bill of complaint, but also because the court found that the word "Pocahontas" could not be exclusively appropriated by complainants as a trade-mark or word-symbol, for the reason that it was and is a geographical word, in and to which all the people of the section of country to which it refers have the common right of use in connection with their business in such locality. It follows, therefore, that further proofs relating to the same would be unavailing, and it was for this reason that the court remanded the cause, with instructions that the bill be dismissed. The ruling is adhered to. We are clearly of the opinion, not only that complainants below are not entitled to an injunction, but also that there is no equity in their bill, and that, therefore, it will be a useless expenditure of time and money, and cause fruitless delay, to take the evidence mentioned in the petition for a rehearing. The prayer of the petition is refused.

(87 Fed. 491.)

INSURANCE CO. OF NORTH AMERICA v. CANADA SUGAR-REFINING CO., Limited.

(Circuit Court of Appeals, Second Circuit. April 19, 1898.)

No. 95.

1. MARINE INSURANCE—PROFITS—TOTAL LOSS.

Under a contract of insurance of the profits on a cargo of sugar "against total loss only" there is no actual total loss of profits where any part, however small, of the cargo, is saved, and reaches the owner in condition to earn a profit; and in such case no recovery can be had.

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2. SAME—CONSTRUCTIVE TOTAL LOSS—MOIETY RULE.
In the United States the owner may abandon ship or cargo, and treat the loss as constructively total, when the damage exceeds 50 per cent. of the total value.

3. SAME—ABANDONMENT.
In cases of constructive total loss, abandonment is indispensable to recovery of insurance, except when it could not possibly be of benefit to the insurer.

4. SAME.
Where insurance is upon the profits of a cargo, and not upon the cargo itself, a partial loss cannot be converted by abandonment into a constructive total loss.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel in personam by the Canada Sugar-Refining Company against the Insurance Company of North America to recover under a policy of marine insurance on profits on a cargo of sugar. The circuit court rendered a decree for libelant (82 Fed. 757), and the respondent has appealed.

Clifford A. Hand, for appellant.

Wilhelmus Mynderse, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The libel in this cause was filed to recover upon a contract of insurance with the libelant, evidenced by a certificate dated April 29, 1893, delivered by the appellant at Philadelphia, whereby the latter caused to be insured under its open policy No. 117,407, against perils of the sea, "$15,000 on profits on cargo of sugar against total loss only, valued at sum insured, shipped on board the British ship John E. Sayre at and from Iloilo to Montreal." The policy contains the usual clause making the insurer responsible only for so much as the amount of prior insurance may be deficient towards fully covering the property at risk. The sugar was owned by the libelant, consisted of about 2,460 tons, was of the value of about $181,000, and was insured for $166,145 by the Atlantic Mutual Insurance Company. The insurance of the Atlantic Mutual Insurance Company covered the original cost price of the sugar to the libelant and an advance in market price since its purchase by the libelant; and when the insurance with the appellant was effected there had been a still further advance in market price, so that the insurance on profits really covered a profit which had accrued to the libelant when it was effected. The appellant had been informed by the libelant of the insurance upon the cargo. July 6th the ship stranded on the coast of Newfoundland, and ultimately became a total wreck. The master at once made arrangements with local salvors for saving and storing the cargo, agreeing to give them one-half saved. The salvors removed from the ship to their own vessels all the cargo capable of being saved. The master was about to arrange for the transportation to Montreal of the part not going to the salvors, when the Atlantic Mutual Insurance Company, which had meantime been informed of the disaster, intervened, and took entire control. That company carried out the agreement made by the master with the salvors, paying them an equivalent

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in lieu of one-half of the sugar saved, and caused the sugar saved to be reconditioned, and shipped to Montreal on the steamer Tiber, and delivered upon arrival there to the libelant. The expenses incurred by the Atlantic Mutual Insurance Company for reconditioning and forwarding the cargo and adjusting the claims of the salvors amounted to $10,167. That company also paid the ocean freight upon the quantity of cargo saved. It adjusted the loss with the libelant by paying the equivalent of the whole amount of its policy less the insured value of the sugar delivered to the libelant. The cargo delivered to the libelant consisted of 307 tons of dry sugar and about 26 tons of wet, and was of the value of about $20,000. There was no notice of abandonment given to the appellant.

Upon these facts the court below was of the opinion that there had been a toal loss of the profits insured within the meaning of the contract, and decreed accordingly for the full amount of the insurance.

The subject of insurance was not the libelant's cargo of sugar, but the profits, and the total loss to which the liability of the underwriter was restricted by the contract of the parties was a total loss of profits. That there was no actual total loss of profits is entirely clear. Insurance of profits of a cargo is an engagement by the underwriter that the goods shall not be prevented by the perils insured against from arriving at their destination in a condition for earning profits; and in a valued policy the parties fix for the purpose of adjusting a loss the sum which the cargo would earn upon safe arrival by way of profits. Under an insurance of profits, a loss of cargo carries with it, of course, the loss of the profits, at least is prima facie evidence of their loss; and under a valued policy the assured is entitled to recover the whole insurance upon proof of a total loss of the goods, without proof that any profits would have been made if the goods had arrived. Barclay v. Cousins, 2 East, 544; Insurance Co. v. Coulter, 3 Pet. 222; Mumford v. Hallett, 1 Johns. 439; Fosdick v. Insurance Co., 3 Day, 108; French v. Insurance Co., 16 Pick. 397. "If a part of the goods only are prevented from arriving, it constitutes a partial loss of those interests, according to the construction put upon it in the United States." 2 Phil. Ins. § 1503. In other words, there can be no actual total loss of profits when part of the goods arrive in condition to earn a profit (Loomis v. Shaw, 2 Johns. Cas. 36), notwithstanding a greater part have been destroyed by the perils insured against (Waln v. Thompson, 9 Serg. & R. 115). In such a case, under a valued policy, the insured can only recover of the underwriter the valuation less the profits to be accounted for. French v. Insurance Co., supra. It is only in a case of total loss that there is any difference between an open and valued policy. Marsh. Ins. 268, 618; Batem. Com. Law, § 1129. In the present case the value of the cargo saved was comparatively insignificant, being only about $10,000, after deducting salvage and expenses, or alternatively something over 150 tons of dry sugar out of 2,460 tons; but, part having been saved, and actually received by the libelant, there was not an actual total loss. A loss of part of the cargo is a proportional loss on profits.

The question then arises whether the libelant was entitled to recover upon the theory of a constructive total loss. A constructive

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total loss is one where the loss, though not actually total, is of such a character that the assured is entitled, if he thinks fit, to treat it as total by an abandonment. A constructive total loss of cargo may arise by the loss of the ship under circumstances amounting to the destruction of the contemplated adventure, when no part of the cargo can be forwarded by a substituted ship except at a cost beyond the value of the goods. So, also, it may arise if the damage to the goods, though repairable, cannot be repaired except at an expense greater than their value when repaired, and is thus impracticable from a business point of view. There is also in the United States a conventional rule, originally adopted because of its convenience and certainty, which authorizes an abandonment of ship or cargo when the damage exceeds a moiety of the value, and a recovery as for a total loss. An abandonment is indispensable in all cases of constructive total loss, except in those where it could not possibly be of any benefit to the insurer.

By the later authorities it is settled that under a policy insuring a ship or cargo against "total loss only" the assured is entitled to recover upon proof of a constructive total loss. Adams v. Mackenzie, 13 C. B. (N. S.) 422; Heebner v. Insurance Co., 10 Gray, 131; Greene v. Insurance Co., 9 Allen, 217; Burt v. Insurance Co., 78 N. Y. 400; Carr v. Insurance Co., 109 N. Y. 504, 17 N. E. 369; Snow v. Insurance Co., 119 Mass. 592. It is a reasonable intendment that when an underwriter offers to indemnify the insured against a "total loss" he means to be understood to include any loss which the latter may justifiably treat as total. If he contemplates a more limited liability, he can protect himself by insuring against actual or absolute total loss. It does not necessarily follow that these words are to be given the same meaning in a policy upon profits as in a policy upon cargo; and our opinion is that they cannot have the same meaning. How can there be a constructive total loss of profits? In all cases where the destruction of the voyage or the damage to the cargo renders it impracticable, because the outlay will exceed the returns, to go on with the adventure, there is an actual total loss of profits, though it may be there is only a constructive total loss of the cargo. The moiety rule cannot apply, because the profits cannot be separated from the goods themselves, and an abandonment is ordinarily so impracticable that the rule cannot be supposed to have entered into the contemplation of the parties when making their contract. It has never been decided that in case of an insurance of profits an actual partial loss of the profits can be made total by abandonment, and the commentators incline to the contrary view. Mr. Phillips says:

"On the whole, it does not seem that the rule of constructive loss of over fifty per cent. of the value is applicable to a policy on profits in favor of the owner of the goods under any circumstances." Phil. Ins. 1656.

Prof. Parsons, after intimating that an actual partial loss of profits cannot be made constructively total by abandonment, uses this language:

"It would seem, therefore, that the fifty per cent. rule would not apply to an insurance on profits unless the insurer (the assured) should waive his right to

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abandon the goods, and, treating the loss of them as partial, abandon the profits separately. In theory this might be possible, but it would be attended with some difficulties, and can hardly be considered as in fact practicable." 2 Pars. Mar. Ins. 170, 171.

If there can be no constructive loss of profits the words "against total loss only" in an insurance upon profits can only refer to an actual total loss. They certainly cannot refer to a partial loss. They can have no effect whatever, if, as has happened here, the assured can retain part of the profits, and yet recover as though all have been lost.

The present contract, in view of the extrinsic facts, was intended to be, in substance, a second insurance on the goods themselves, "another way of valuing the goods" (Tom v. Smith, 3 Caines, 247), to cover the value represented by the advance in market price, and not adequately protected by prior insurance. See Ionides v. Pender, L. R. 9 Q. B. 531–536. Indeed, it is customary at the place where this contract was made to insure profits under the general denomination of "goods." Pritchet v. Insurance Co., 3 Yeates, 461. If the cargo itself, instead of the profits, had been the interest insured, the libelant would have been indemnified only to the extent that the prior insurance might prove insufficient. Insurance is a contract of indemnity, and cannot extend to cover the loss in excess of the real loss; and, even under a valued policy, where there is a prior insurance, the assured cannot recover upon it more than will, with what has been received from the prior insurance, make up his whole loss. Craig v. Murgatroyd, 4 Yeates, 161; Watson v. Insurance Co., 3 Wash. C. C. 1, Fed. Cas. No. 17,286; Stevenson v. Insurance Co., 54 Me. 71; Pleasants v. Insurance Co., 8 Cranch, 55. The property at risk was really the cargo, because the profits were merely an excrescence of the goods; and, if the contract had not been "against total loss only," the appellant would have been liable only for the deficiency. It cannot be that the insertion of these words were intended to enlarge the extent of the appellant's liability. They were meant to restrict it. They were used in view of the doctrine, expressed by the commentators upon insurance, that there cannot be a constructive total loss of profits. We think the insurance was placed upon the profits instead of upon the cargo directly, and restricted to a total loss only, to save any question as to the liability of the appellant for a partial or constructive total loss; otherwise there would have been no occasion for naming that interest, and the insurance would have been upon the cargo itself.

By the decree of the court below the libelant has been awarded a recovery, which, if collected, would put into its pocket the profits realized on the cargo saved, in addition to the amount of the respondent's policy. Irrespective of this consideration, and because it has received the profits on a part of the cargo, we are of the opinion that there has not been a total loss of profits within the meaning of the contract.

The decree is reversed, with costs, and with direction to dismiss the libel.

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(86 Fed. 865.)

SOUTHERN RY. CO. v. SHAW.

(Circuit Court of Appeals, Fifth Circuit. April 19, 1898.)

No. 625.

1. TRIAL—ARGUMENT OF COUNSEL—IRRELEVANT TESTIMONY.
   The court may properly direct counsel to desist from discussing to the jury immaterial evidence that has been ruled out.
2. SAME—REQUEST TO CHARGE—UNFAIR STATEMENT OF EVIDENCE.
   Requests to charge, which do not fairly state the testimony, and which sum up the evidence for the defendant without stating with anything like judicial fairness what it tends to prove, are properly denied.
3. NEGLIGENCE—STEALING RIDE—DUTY OF RAILROAD COMPANY.
   After the presence of a person stealing a ride on a train is discovered, the railroad company owes him the duty which humanity imposes, and his efforts to cling to the train to prevent falling under the wheels cannot be considered as a resistance to those attempting to remove him while the train is in motion.[1]
4. SAME.
   Where a person stealing a ride on a train continues to get on after being put off, it does not entitle the railroad company to use increased force, especially where the trespasser is a child 10 years old.
5. SAME—ORAL REQUESTS MADE DURING ARGUMENT TO JURY.
   The court is not bound to notice oral requests to charge, made by counsel during his argument to the jury.

In Error to the Circuit Court of the United States for the Southern District of Georgia.

Walter B. Hill and N. E. Harris, for plaintiff in error.
R. C. Jordan, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

McCORMICK, Circuit Judge. Dennis Shaw, by his next friend, Mary Doyle, the defendant in error, brought his action against the Southern Railway Company, the plaintiff in error, to recover damages for personal injuries inflicted on him by a moving train of railroad cars which was being operated by the plaintiff in error, stating his case, so far as we deem it necessary to quote from his petition, thus:

"That on or about the 20th day of August, 1895, your petitioner, who was a minor of only ten years of age, and whose mother and father were both dead, lived with a colored man in the city of Macon, who continually beat, abused, and so cruelly treated your petitioner that he could no longer live with him. That on or about said 20th day of August, 1895, your petitioner left the city of Macon, and walked as far as the first station on defendant's road south of Flovilla, Georgia. That while your petitioner was at said station, on said 20th day of August, 1895, one of the passenger trains of the defendant, which was going north, stopped at said station, and your petitioner, desiring to get to Atlanta, Georgia, being tired and footsore, and having no money with which to pay his fare, got under one of the cars of said train, holding on by means of the beams, fastenings, and iron rods under said car. That your petitioner rode in this position until the train reached Jackson, Georgia, at which station defendant's train again stopped. That, just as the said train was leaving Jack-

[1] See note at end of case.

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son, and after it had begun to move with considerable speed, the flagman on said train, which said flagman was a servant and employé of the defendant, discovered your petitioner riding under said car; and, instead of stopping the train, and removing or having your petitioner removed, as he had a right to do, and as it was his duty to have done, he, the said flagman, recklessly, wantonly, willfully, and maliciously caught and grabbed your petitioner by the leg, and jerked, pulled, and kicked him loose from under said car."

The plaintiff in error (the defendant below), besides the general denials, not necessary to be quoted, answered:

"That on the 20th day of August, 1895, a number of negro tramps were attempting to steal a ride upon its north-bound passenger train, known as train 'No. 7,' going from Macon to Atlanta. That it was discovered, just as said train moved off from Jackson, in said county of Butts, that these tramps or trespassers were riding upon the trucks of one of the coaches of said train. Thereupon the train was stopped, and the train hands ordered said trespassers to get off the trucks, which they then and there did, the train having come to a full stop when they were ordered off and when they got off. Thereupon the train again moved off, and, after proceeding only a short distance, it was again discovered by the train hands that all or some of these trespassers had again gotten upon the trucks of said car. That thereupon the train was again stopped, and the said train hands ordered the said trespassers to get off of said trucks, which they then and there did while the train was standing still, and then the defendant's train proceeded on its route to Atlanta. * * * Defendant does not know the age of the plaintiff, but denies that his father was dead, and also denies that the plaintiff was beaten, abused, and cruelly treated by the colored man with whom he lived in the city of Macon. On the contrary, the defendant is informed that the plaintiff lived in Macon with his father; that his father treated him kindly; and that the plaintiff, without cause, or the knowledge of his father, ran away from home."

The judge, in the opening of his general charge to the jury, used this language:

"The action is brought by the plaintiff to recover damages for the mutilation of his person,—the loss of one arm and a portion of the hand of the other arm. It is not disputed that the plaintiff was injured. The extent of his injuries is not controverted; nor is it disputed that the injuries were sustained because one of the cars of a passenger train of the defendant company ran over and crushed the arm of the plaintiff and a portion of his hand. The plaintiff's case depends upon the question whether or not he has satisfactorily maintained by proof his contention that he was unlawfully, recklessly, and negligently ejected from the cars of the defendant company."

On this vital issue, thus clearly stated to the jury, there was much testimony offered which tended to support the plaintiff's case, and much other testimony in conflict therewith. The case came on for trial on the 30th of April, 1897, and remained on trial continuously (excluding Sunday) until the 4th of May. Before the court began the charge to the jury, the defendant's counsel submitted the following:

"Requests to Charge by Defendant.

"Dennis Shaw, by Next Friend, vs. Southern Railway Company.

"Defendant's counsel respectfully ask the court to give in charge to the jury the following requests (the same being made as separate requests):

"(1) In this case the plaintiff, by his own admission, was a trespasser upon the defendant's train. In such case there is no presumption against the defendant company, even though the defendant was injured by the running of the cars of the railroad. The burden of proof is on the plaintiff to show that, if a trespasser, he was injured by the defendant or its agents in such manner as to entitle him to recover under the rules of law as given you by the court. The plaintiff must show by the preponderance of the evidence that he was injured in the manner alleged in his amended declaration.

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"(2) 'Where no duty of diligence appears relatively to the person injured, there can be no presumption of its breach, notwithstanding the broad language of section 3033 of the Code. That section imposes the burden of proving the observance of such diligence as was due; not the burden of proving that none was due. For a railroad to be exempt from liability for a personal injury done by the running of its locomotives or cars, it is only necessary for it and its agents to exercise all ordinary care and diligence (if any) due from it and its agents relatively to the person injured.' Holland v. Sparks, 92 Ga. 753, headnote 1, 18 S. E. 990. See, also, Waterbury v. Railroad Co., 17 Fed. 682, note, art. 1, § 5.

"(3) For the purpose of expelling a trespasser from a train, the employés of a railroad company may lawfully use whatever amount of force is reasonable, proper, and necessary.

"(4) In this case the plaintiff states that he was stealing a ride from Flovilla to Jackson; that, after the train left Jackson, it slowed up, and that when it slowed up he could have gotten off with safety; that he did not then get off; that afterwards the flagman of the train attempted to pull him off; that he resisted this effort forcibly. Upon this state of facts, appearing from the plaintiff's admissions, the court charges you that, if you believe the plaintiff's statement to be true, then the defendant's agents had the right to use some force in removing him from the train, and such as was necessary for the purpose.

"(5) The railroad company in this case was not under any duty to the plaintiff as a trespasser. The only limitation upon its right to remove a trespasser from the train is that the force used in such removal shall not be unnecessary or wanton or malicious, or exercised for the purpose of injuring the plaintiff.

"(6) If, in this case, the jury believes the plaintiff's statement to be true, and that he was upon the train after it had 'slowed up' for the purpose of getting him off; that he remained on the train in spite of his knowledge of this purpose; that the train afterwards stopped,—the plaintiff stating that he could have gotten off, when it stopped, with safety, and that after the train began to move it moved forward at the rate of only three or four miles an hour; that this rate of motion was about half as fast as a man ordinarily walks, and that while the train was moving thus slowly the flagman attempted to pull the plaintiff off,—the plaintiff resisting; and that the flagman believed, and had reasonable cause to believe, that at this rate of speed the plaintiff could be removed from the train without injury; and that the flagman for the sole purpose of removing the plaintiff, and not for the purpose of injuring him, removed the plaintiff, and that the falling of the plaintiff under the wheels was unavoidable and unintended accident,—then, in this case, the defendant will not be liable.

"(6) If the jury believe from the evidence that the plaintiff got off the train at Jackson, and that as the train moved off he got on again; that the train came to a stop, and that the plaintiff, with other trespassers, was then warned off; that when the train moved off from this stop the plaintiff again got upon it, and that there was a second stop of the train for the purpose of removing trespassers, and that at this second stop the plaintiff and other trespassers were again warned off, and that when the train moved off the plaintiff again got upon the train,—the court charges you that this continuing trespassing on the part of the plaintiff puts him in the attitude towards the defendant company of a persistent and obstinate trespasser, and that the degree of force which the defendant's agents were entitled to use in removing him from the train would increase along with each additional degree of persistency and obstinacy exhibited by the plaintiff, and the defendant would not be liable for the exercise of force in removing him from the train unless the force so exercised was out of proportion to the persistency and obstinacy of the plaintiff's efforts to continue upon the train, and unless the removal was accomplished with unnecessary, malicious, or wanton violence.

"(7) In this case the defendant's defense is a total denial of the plaintiff's allegation as to the manner in which he was injured; and if the jury believe from the evidence which has been adduced by the defendant that the plaintiff's allegations have been disproved, then the plaintiff cannot recover, and it is not incumbent upon the railroad company to account for the manner in which the plaintiff has been injured.

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"(8) In considering the truth of the plaintiff's allegations, you will consider their reasonableness. And if you believe from the evidence that the plaintiff, if riding upon the truss rods, was at a point near the outside edge of the baggage car, and that, if he was pulled down from this position, he would not have fallen upon the rail, but would have fallen outside the rail; or if you find from the evidence that he was secreted under the trucks, and in the middle of the car, and if the plaintiff states that he was pulled and kicked from about the middle of the car; and if you believe from the evidence that on account of the height of the car above the ground, and on account of the distance from the middle of the car to the position a man would occupy on the outside of the same, it was physically impossible for the plaintiff to be kicked from the car in that position,—then all these matters are proper for your consideration in determining the truth of the plaintiff's statement.

"(9) In this case the defendant has adduced evidence tending to show that after leaving Jackson the plaintiff's train made a full stop, and that the trespassers on the train, including the plaintiff, were then warned off and got off the train; that, after the train moved on, they got back upon the train; that the train stopped a second time; that again the trespassers, including the plaintiff, were warned off and removed; that both of these stops were for the sole purpose of removing those trespassers from the train; that no one of the train employés at any time touched or got his hand upon the person of the plaintiff; that both of these stops of the train were south of the point where, upon the next morning, a quantity of blood was found upon the track, and one of the plaintiff's fingers was picked up; that this point where the blood and the finger were found was at a point where the train was moving forward after its second stop, and two hundred and forty yards distant from the north end of the depot; that none of the train hands heard the cries of pain which the plaintiff declares he made at the time he was injured. Now, if the evidence which has been submitted by the defendant satisfies you of the general truth of the theory above outlined, then your verdict will be for the defendant."

On this paper the trial judge made the following note: "In so far as these requests are pertinent and permissible, the court prefers to give them in his own language." The judge, on his own motion, gave an extended and comprehensive charge to the jury, embracing such instructions as he considered pertinent to all the features of the case presented by the pleadings and the proof. There was a verdict and judgment in favor of the plaintiff for the sum of $1,750, from which the defendant has sued out and prosecutes this writ of error.

The assignment of errors suggests: (1) That the court erred in ruling that the testimony of a certain witness (Hartswell), set out in the bill of exceptions, had anything to do with the case, and in directing the defendant's counsel to desist from their discussion of the same. The bill of exceptions referred to shows the testimony of that witness in full, and shows that at the close of his examination on the stand the court announced: "I fail to discover any materiality in any of this testimony. It is perhaps interesting as illustrative of a certain phase of life and existence, but it has no material relation to this case. The boy denies that the witness is his father. In law he is not his father, although perhaps the author of his existence." We have read the testimony of the witness referred to with care, and, like the trial judge, we cannot discover in it anything that is material to any of the issues in the case. The jury must have understood the court to have ruled it out. Counsel should have so understood it. And when, disregarding the clear announcement of the court, counsel was proceeding to discuss this testimony to the jury, the court properly forbade it.

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The errors numbered 2 to 8, inclusive, suggest that the court erred in refusing requests to charge numbered 4 to 9, inclusive, as given above. We here quote with approval the language of a distinguished judge, who, on a like occasion, attached this note to a similar request for charges:

"The court declined to give the requests to charge the jury, as indicated above, for the reason that, in so far as they were deemed proper, they were thought to be covered by the instructions given, and also because it is regarded as a pernicious practice to couch voluminous instructions to the jury in the precise language desired by counsel, when the court, in the performance of its duty, thinks it more conducive to a fair trial to use language not colored by the zealous anxiety of the advocate, even though the language of the presiding judge may not be altogether so felicitous as that suggested by counsel. This is especially true when the requests for instructions are so extensive as practically to appropriate all the functions of the court with relation to instructions to the jury."

We have observed that in suits by persons claiming damages from railroad companies for personal injuries inflicted by the operation of their trains, an elaborate thesis on the subject of the carrier's liability, compiled by the defendant's counsel from language found in the reported opinions of courts of last resort, or in the headnotes to such opinions, and applied argumentatively to the counsel's view of the proof in the particular case on trial, so as to embrace and exhaust every feature of it, is almost invariably presented to the court before the judge delivers his own charge to the jury. We think it is safe to say that the United States judges, who are appointed for good behavior, are somewhat conversant with the reported opinions of courts of last resort on questions so constantly before the courts as the questions involved in this case. The object in presenting such requests to charge appears to be to furnish a basis for assignments of error. It is not rational to suppose that learned counsel, practicing before a court presided over by a judge whose tenure is permanent, and with whose modes of thought and method of action they are or may become so well acquainted, reasonably expect such a judge to give exactly in the language they use the particular and numerous instructions they request. Considered, therefore, as a basis for an assignment of error, it is appropriate to suggest to such counsel that the object of an assignment of error is to reach the minds of the judges of the court of errors; and for this purpose the office of a requested charge is to make specific the counsel's exceptions to an erroneous charge given by the court, or an omission to charge on a point or matter calling for instructions.

We have observed, and have more than once remarked, on another general tendency in the practice of counsel representing railroad corporations (and not always restricted to them), inducing them to bring to this court, on one ground or another, all of the evidence offered on the trial in the circuit court. In the bill of exceptions in this case we find this language:

"Evidence was adduced in behalf of the plaintiff and defendant, which is hereto attached as 'Exhibit A,' and made a part of this bill of exceptions, and identified by the signature of said judge; said evidence being material to the understanding of the cause, and being all of the evidence that was adduced

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by either party in said cause, the whole of the same being material to an understanding of the exceptions made and errors assigned."

Waiving the compliment to the judicial vision of the circuit court of appeals, we suggest that it is not conducive to our understanding of the exceptions made and the errors assigned to send up to us 76 printed pages of questions and answers, showing the direct, cross, and redirect examination of various witnesses on the stand, the tendency of which testimony to support the contradictory contentions of the parties could easily have been clearly stated on a single page.

The fourth request should not have been given, because it did not fairly state the plaintiff's testimony. His testimony does not show that he forcibly resisted the effort to remove him from the train. It does show that, while the train was still moving at the rate of three or four miles an hour, the flagman seized him by his feet, and he held onto the rod with his left hand, to keep from falling so that the wheel would run over his arm. The fifth request was properly refused, because it is not sound as matter of law. Though the plaintiff was a trespasser, after his presence was discovered the corporation did owe him the duty which humanity imposed. The first request numbered 6 was properly refused, because it undertakes to give the plaintiff's statement,—referring, doubtless, to his statement as a witness on the stand,—and is subject in a higher degree to the criticism which we have made on request No. 4. The next request, also numbered 6, was properly refused, because the hypothesis which it submits to the jury finds no reasonable support from the testimony taken as a whole, and, further, because, in view of the fact that the train was moving at the time, the instruction is not sound, even if the hypothesis it submits was supported by the preponderance of the proof. And especially is this true when we consider the tender years of the trespasser. The seventh request should have been refused, because 12 men competent to sit on a jury do not require to be instructed that, if the plaintiff's allegations have been disproved, he cannot recover. And the concluding line of this request is a non sequitur.

Requests Nos. 8 and 9 should have been refused, because they undertake to sum up the evidence in behalf of the defendant, as drawn from the testimony offered by the defendant, and from the pleadings and the testimony of the plaintiff, and they do not state with anything like judicial fairness and fullness what the evidence tends to prove, but in a confused way seek to emphasize unduly certain detached elements in the case, consisting partly of direct testimony, but largely of conclusions of fact expressed by the different witnesses, and conclusions of fact and of law deduced by the counsel from the direct testimony and the conclusions of the witnesses. We conclude that there was no error in refusing these requests as tendered to the court before it, on its own motion, had charged the jury. The ninth error assigned is that the court failed to charge the jury with reference to the effect of the impeachment of the plaintiff by the proof of his previous contradictory statements. There was no request in writing tendering to the court a proper instruction

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on this subject, even if the case called for an instruction on the subject, which is by no means apparent to us. The record shows that in the midst of his oral argument to the jury, while discussing what the counsel claimed to be discrepancies between statements made by the plaintiff on the stand and statements he had made to others, counsel turned to the court, and orally requested the court to submit to the jury a proper instruction bearing upon that phase of the proof. It was not error in the court to omit to comply with this request thus made. The tenth, eleventh, twelfth, and thirteenth errors assigned suggest that the court erred in giving certain portions of his general charge. We do not discuss them in detail. We have examined them in detail, and read them carefully in connection with all of the other portions of the charge, and, thus read, we do not find in them any error for which the case should be reversed. It follows that the judgment of the circuit court should be, and it is, affirmed.

NOTE.

Duty of Railroad Company to One Stealing Ride on Its Train.

1. General Principles.

[a] (Ky. App. 1896) Where one, while riding, as a trespasser, under defendant's freight car, was injured by falling under the wheels, and the question in issue was as to whether plaintiff so fell and was injured by reason of being pushed from the car by one of defendant's brakemen or from some other cause, it was error to instruct that plaintiff was not entitled to recover, however violently ejected from the car, in case he was himself guilty of negligence which contributed to his injury.—Thurman v. Railroad Co., 34 S. W. 893.

[b] (Minn. Sup. 1895) Trainmen are not bound to use reasonable care to see that a trespasser does not expose himself to personal injury.—McNamara v. Railway Co., 63 N. W. 726, 61 Minn. 296.

[c] (Pa. Sup. 1887) A trespasser upon a railroad train cannot be ejected therefrom without a reasonable regard for his safety; and, where the facts of a case are such as to leave room for doubt whether such reasonable regard has or has not been used, the question is for the jury.—Arnold v. Railroad Co., 8 Atl. 213, 115 Pa. St. 135.

[d] (Tex. Civ. App. 1893) A railroad company, after it has discovered a trespasser on one of its cars, is bound to afford him an opportunity to leave without exposing him to unnecessary danger, and is liable for his death, caused by his being forced to leave the car while in motion.—Railway Co. v. Mother, 24 S. W. 79, 5 Tex. Civ. App. 87.

[e] (Tex. Civ. App. 1894) The law as to unnecessary violence in the expulsion of a person from a train is the same whether the person is rightfully or wrongfully on board.—Southern Pac. Co. v. Kennedy, 29 S. W. 394, 9 Tex. Civ. App. 232.

[f] (Tex. Civ. App. 1896) In an action against a railroad company for injuries to a trespasser, caused by his being compelled by a brakeman to jump from the train while moving, a charge that "defendant had the right to order him off such train, or to eject him therefrom, or to do both, but in doing so it was the duty of defendant to use reasonable and ordinary care, under the circumstances of the case, so as to not injure him," did not require too high a degree of care.—Railroad Co. v. Grigsby, 35 S. W. 815, 13 Tex. Civ. App. 639.

[g] (Utah Sup. 1893) Where plaintiff was injured through the gross negligence of defendant's trainmen, who had knowledge that he was on the train, defendant is liable for the injury, even if the plaintiff was a trespasser.—Everett v. Railway Co., 34 Pac. 289, 9 Utah, 340.

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[h] (Va. Sup. Ct. App. 1896) A trespasser on a train must be given a reasonable opportunity to alight without danger, and may recover for injuries received through being forced to leave the train, while it is in motion, by employés acting within the scope of their employment.—Railroad Co. v. Anderson, 25 S. E. 947, 93 Va. 650.

2. —— Children.

[a] (Ill. App. 1893) An engineer must exercise ordinary care for the safety of a boy who is wrongfully on his locomotive, in his efforts to get the boy off.—Railway Co. v. Doherty, 53 Ill. App. 282.

[b] (Ind. Sup. 1895) Plaintiff, an active boy, eight years old, in disregard of the engineer's warning, jumped on a freight train moving up a sharp grade, eight miles an hour, and clung to the iron loop on the car, provided for that purpose, with one foot on the grease box of the truck. *Held*, that the fact that the trainmen saw him hanging there, and did not stop the train, did not render the company liable for injuries received by him in jumping off.—Railroad Co. v. Redding, 39 N. E. 921, 140 Ind. 101.

[c] (Miss. Sup. 1895) A boy 13 years of age, who had boarded a moving freight train, was ordered by the conductor to get off while the train was yet in motion, but running more slowly than when he got on; and, in attempting to obey, he fell under the train, and was injured. *Held*, that the question as to whether the act of the conductor was negligence was for the jury.—Thompson v. Railroad Co., 17 South. 229, 72 Miss. 715.

[d] (Mo. Sup. 1893) In an action by a boy to recover for injuries received, it appeared that the watchman of a railroad company had only one arm; that the boy was hanging on the ladder on the car; that when the car reached the watchman he pulled plaintiff off, when he fell, and was injured. *Held*, that the issue of negligence was for the jury.—Brill v. Eddy, 22 S. W. 488, 115 Mo. 596.

[e] (Tex. Civ. App. 1895) A child 12 years of age, and lacking in intelligence, who gets on a moving train at a street crossing, and is injured, may recover against the company, where its servants know, or might have known, that it was in a position of danger, and fail to exercise ordinary care to prevent injury to it.—Thompson v. Railway Co., 32 S. W. 191, 11 Tex. Civ. App. 307.

3. Who are Trespassers.

[a] (Mich. Sup. 1896) A yardman in the employ of a railroad, whose duty it was to deliver freight cars from his own company to defendant company, and to receive cars from defendant company to his own, and who at the most had only an invitation from defendant to visit its yards from time to time to see if there were cars for plaintiff's road, cannot recover of defendant for injuries received from getting on the side of defendant's train, without invitation, and without the knowledge of any of the crew, for the purpose of going to defendant's yard; plaintiff being a trespasser.—Grunst v. Railway Co., 67 N. W. 335, 109 Mich. 342.

4. Authority of Servant to Eject Trespasser.

[a] (Ala. Sup. 1893) A trespasser on a railroad train is entitled to recover for a wanton, willful, or intentional wrong committed by a brakeman within the scope of his employment, and to have exemplary damages included in the verdict.—Railroad Co. v. Seals, 13 South. 917, 100 Ala. 368.

[b] (Ga. Sup. 1896) Under Code, § 3033, a railroad company is liable for an injury to a child, though a trespasser, caused by the willful act of its employé in pushing such child from a moving train, whether ejecting trespassers from the train was or was not within the scope of such employé's duties.—Smith v. Railway Co., 27 S. E. 725, 100 Ga. 96.

[c] (Ga. Sup. 1896) Where there is evidence to show that plaintiff's child was wantonly pushed from a car forming a part of a moving train, of the defendant, and seriously injured, and also evidence from which it could have been inferred that the person by whom the child was pushed from the car was at the time in the employment and service of the defendant on that train, the case should be submitted to the jury.—Smith v. Railway Co., 27 S. E. 725, 100 Ga. 96.

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[d] (Kan. Sup. 1887) It is within the scope of the general authority of a brakeman on a freight train to prevent trespassers from getting on the train, and to remove such persons who wrongfully get thereon; but if, in so doing, he does not exercise care and caution, but acts wantonly or maliciously, and an injury results, the railroad company is liable.—Railroad Co. v. Kelley, 14 Pac. 172, 36 Kan. 655.

[e] (Ky. App. 1893) A brakeman has an implied authority to remove from his train, in a lawful manner, a trespasser found on a car platform.—Smith v. Railroad Co., 23 S. W. 652, 95 Ky. 11.

[f] (Miss. Sup. 1893) A railroad company is not liable to a trespasser on its trains for personal injuries caused by the willful and malicious misconduct of its servant, unless the act complained of was done in the discharge of the servant's duty, and within the line of his employment.—Railroad Co. v. Harris, 14 South. 263, 71 Miss. 74.

[g] (Miss. Sup. 1897) Where a flagman, whose duty it is, on discovering a trespasser on a train, to take him to the conductor, and then, if so directed, to stop the train, and put him off, ejects a trespasser on his own responsibility while the train is in motion, the company is liable for the resulting injury.—Railway Co. v. Hunter, 21 South. 304, 74 Miss. 444.

[h] (Mo. App. 1888) A boy stealing a ride on a freight train was ordered to get off by the brakeman, and objected to doing so because the train was moving too rapidly, but nevertheless began to do so, when the brakeman stepped on his fingers as he was going down the ladder, causing him to relax his hold and fall to the ground. *Held*, that the railroad company was not liable for the injuries sustained, in the absence of evidence showing that the brakeman's acts were within the scope of his employment.—Farber v. Railway Co., 32 Mo. App. 378.

[i] (N. Y. Sup. 1894) Where, in an action for personal injuries against a railroad company, the evidence shows that plaintiff was knocked from a car by a brakeman in defendant's employ, whether such act was within the scope of his authority is a question for the jury.—Lang v. Railroad Co., 30 N. Y. Supp. 137, 80 Hun, 275.

[j] (N. Y. Com. Pl. 1894) Authority of a street-car driver to expel trespasser from the car is implied from the employment, and therefore the company is liable for unnecessary violence of the driver in exercising such authority.—Amato v. Railroad Co., 29 N. Y. Supp. 51, 9 Misc. Rep. 4.

[k] (Tex. Civ. App. 1893) A railroad company is not liable for the willful act of a brakeman in kicking a trespasser from its moving train, whereby the latter was killed, in the absence of evidence to show that it was within the general scope of the brakeman's authority to eject trespassers from its trains. Railway Co. v. Anderson, 17 S. W. 1039, 82 Tex. 519, followed.—Railway Co. v. Moody, 23 S. W. 41.

[l] (Tex. Civ. App. 1893) Evidence that a railroad company had knowledge of a custom of its brakemen to order trespassers from its cars, and to eject them therefrom, supports a finding by the jury that it had vested its brakemen with implied authority to order trespassers from the cars, so as to render it liable for the improper exercise of such authority by one of them.—Railway Co. v. Mother, 24 S. W. 79, 5 Tex. Civ. App. 87.

[m] (Tex. Civ. App. 1893) A trespasser improperly expelled from a car by a brakeman, who seeks to hold the company liable therefor, must show that the acts of the brakeman were within the scope of authority in fact conferred on him by the company, since the duty of expelling trespassers rests, prima facie, on the conductor.—Railway Co. v. Mother, 24 S. W. 79, 5 Tex. Civ. App. 87.

[n] (Tex. Civ. App. 1894) A railroad company is liable for the act of a conductor who, having ordered a trespasser from one of its trains, shot him while he was in the act of alighting, unless the shooting was not done for the purpose of forcing the trespasser to get off, but from personal resentment.—Southern Pac. Co. v. Kennedy, 29 S. W. 394, 9 Tex. Civ. App. 232.

[o] (W. Va. Sup. Ct. App. 1891) To charge a railroad company for the willful wrong of an employé in forcing a trespassing boy from a moving train, whereby he is injured, it must appear that the act was in the course of the

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employé's business, and within the scope of his authority.—Bess v. Railway Co., 14 S. E. 234, 35 W. Va. 492.

5. Manner of Ejecting Trespasser.

[a] (Ind. Sup. 1893) Though plaintiff in an action against a street-railway company for personal injuries resulting from his ejectment was wrongfully on the car, defendant would be liable if the conductor used more force than was necessary to eject him, regardless of whether he thought that he was using more than was necessary.—Railroad Co. v. Willoeby, 33 N. E. 627, 134 Ind. 563.

[b] (Ky. App. 1896) A trespasser, who was injured while trying to climb upon a car in a slowly-moving freight train, which he was prevented from doing by a brakeman, cannot recover damages from the railroad company, unless the injury was caused by the use of unnecessary force by the brakeman.—Railroad Co. v. Bernard, 37 S. W. 841.

[c] (Mo. Sup. 1893) Where a day watchman in the employ of receivers of a railroad company fails to use ordinary care in removing a boy from a moving car on which the latter is riding in violation of a city ordinance making such act a misdemeanor, the receivers are liable for any injuries to the boy caused by the negligence of such watchman.—Brill v. Eddy, 22 S. W. 488, 115 Mo. 596.

[d] (N. J. Sup. 1888) A railroad passenger who is unprovided with a ticket entitling him to ride, and who refuses to either pay his fare or leave the train, may be forcibly ejected by the agents of the company. If, in so doing, there is more violence than is necessary, the company and its agents are liable for damages resulting.—Jardine v. Cornell, 14 Atl. 590, 50 N. J. Law, 485.

[e] (Tex. Civ. App. 1895) A railroad company is liable in damages to a trespasser who was ejected from a moving train by the porter, and seriously injured, when greater force than necessary was used.—Railway Co. v. Huffman, 32 S. W. 30.

6. Time of Ejecting Trespasser—Moving Train.

[a] (Ill. Sup. 1888) A railroad is liable for injuries to a child seven years of age who was riding on an engine in violation of the rules of the company, and, while the engine was in motion, was told by the engineer to get off, which he did, being thereby injured, whether the child was or was not on the engine by the engineer's invitation.—Railway Co. v. West, 17 N. E. 788, 125 Ill. 320.

[b] (Ill. App. 1893) A railway company is liable for injury to a trespasser forcibly ejected by its brakeman from its train while in rapid motion.—Railroad Co. v. Reagan, 52 Ill. App. 488.

[c] (Kan. Sup. 1887) Where a boy 15 years old gets upon a freight train wrongfully, and as a trespasser, for the purpose of riding without paying his fare, and is commanded by the brakeman to jump off the train while in dangerous motion, in the nighttime, and in obedience to that command, and in fear of being thrown off, jumps off the train, and is run over and injured, the company is liable.—Railroad Co. v. Kelley, 14 Pac. 172, 36 Kan. 655.

[d] (Ky. App. 1893) Where a brakeman, in removing a trespasser, kicks him from the train while in rapid motion, the railroad company is liable for injuries caused thereby.—Smith v. Railroad Co., 23 S. W. 652, 95 Ky. 11.

[e] (Mo. Sup. 1897) In an action for ejection of plaintiff's son, a trespasser, by a brakeman acting within the scope of his employment, an instruction that if "said employé forced plaintiff's son to comply with such order by stepping on his fingers on the ladder whereon plaintiff's son was then standing, and that in so doing said employé failed to exercise ordinary care to put off said son of plaintiff in a place and manner safe to life and limb (regard being had to all the facts and circumstances shown by the evidence)," the verdict should be for plaintiff, authorizes a finding for plaintiff if the brakeman negligently ordered the son to leave the train while in motion, and he was injured while obeying the order, though the brakeman may not have stepped on his fingers to force him off.—Farber v. Railway Co., 40 S. W. 932, 139 Mo. 272.

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[f] (Mo. Sup. 1897) Where a brakeman, acting within the scope of his authority, negligently ordered a trespasser to alight from a moving train, and the trespasser was injured while obeying the order, the company is liable, though no actual force was used.—Farber v. Railway Co., 40 S. W. 932, 139 Mo. 272.

[g] (Tex. Civ. App. 1893) In an action for the death of a trespasser on one of defendant's trains, who was forced to leave a freight car, while in motion, through the "cuddy hole," it is proper to charge that defendant is liable if he was compelled to leave by one of defendant's duly-authorized servants at a time and under circumstances rendering it "dangerous" so to do, without charging specifically as to the degree of danger.—Railway Co. v. Mother, 24 S. W. 79, 5 Tex. Civ. App. 87.

(87 Fed. 453.)

In re THOMAS.

(Circuit Court of Appeals, Sixth Circuit. April 5, 1898.)

No. 522.

OLEOMARGARINE—USE IN NATIONAL SOLDIERS' HOME—REGULATION BY STATE.

The governor of the Soldiers' Home at Dayton, Ohio, in serving to the inmates as food oleomargarine furnished by the government, is not subject to the law of the state prescribing the manner in which oleomargarine shall be used in eating houses. The legislature having no power to regulate the conduct of such institution, the statute is to be construed as not applying thereto.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This was an application by J. B. Thomas, governor of the Soldiers' Home at Dayton, Ohio, for a writ of habeas corpus to release him from imprisonment under state process for alleged violation of the state statutes in serving to the inmates of the Home oleomargarine, without first complying with the state regulations in that regard. The petitioner was discharged by the circuit court, and the present appeal was taken from its order. The opinion filed below, and here reprinted from 82 Fed. 304, was in full as follows:

TAFT, Circuit Judge. In this case J. B. Thomas has filed a petition for a writ of habeas corpus. His petition states that he was on March 2, 1897, and has since continued to be, governor of the Central Branch of the National Military Home for Disabled Volunteer Soldiers, which is located in Montgomery county, Ohio, on certain grounds purchased, held, and used by the United States for the purposes set forth in an act entitled "An act incorporating a national military and naval asylum for the relief of the totally disabled officers and men of the volunteer forces of the United States," approved March 3, 1865, and the act amendatory thereof, approved March 21, 1866, and other acts amendatory and supplementary thereto; that he is unjustly and unlawfully detained and deprived of his liberty at the city of Dayton, in the county aforesaid, by one L. J. Shafer, a constable of said county, by virtue of a certain warrant of commitment issued by one J. R. Thompson, a justice of the peace within and

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for said county, charging that the petitioner, as governor as aforesaid, did, on March 2, 1897, unlawfully serve and furnish to the inmates of said National Military Home for Disabled Volunteer Soldiers, as food to be then and there eaten by said inmates, certain oleomargarine, in violation of the statutes of the state of Ohio; that petitioner, being brought before said justice of the peace, refused to plead to said charge, and moved to dismiss the same on the ground that the acts upon which said proceeding was founded were done by him in the discharge of his duty as governor of said national home under the authority of the board of managers in charge of said institution by virtue of the acts of congress aforesaid, and by authority of said acts; that they were entirely done and performed on the grounds acquired, used, and controlled by the United States for the purpose of said home, and with respect to the inmates thereof, only in their maintenance and support by the United States, and not otherwise, said acts having consisted merely in distributing to them supplies procured for such use by authority of congress and said board of managers; that the facts averred above as the ground of said motion are true; that, notwithstanding the premises, said justice of the peace proceeded to try petitioner on said charge, found and adjudged him guilty of the offense aforesaid, and sentenced him to pay a fine of $50, and stand committed until the same should be paid, and thereupon issued the warrant of commitment aforesaid. Petitioner avers that said justice of the peace had no jurisdiction over the lands and territory whereon said acts were done, or over the petitioner, by reason of said acts, and that said proceedings and warrant of commitment are wholly void. A writ of habeas corpus issued upon this petition. The body of the petitioner was produced into court. The constable made a return that he held the said J. B. Thomas under the commitment of a magistrate as averred in the petition. On the hearing in this court it appeared that there was an agreed statement of facts in the cause before the justice of the peace as follows:

"The following facts are agreed upon to support the issues in the above-entitled cause: It is agreed on behalf of the state of Ohio, Charles H. Bosler, its attorney in this action, being present, and consenting thereto, and the defendant, J. B. Thomas, being present, and, with counsel, also agreeing thereto: (1) That on the 2d day of March, 1897, Joseph E. Blackburn was, and now is, the food and dairy commissioner of the state of Ohio. (2) That on the 2d day of March, 1897, J. B. Thomas was, and now is, the duly chosen and acting governor of the Central Branch of the National Home for Disabled Volunteer Soldiers, located in the county of Montgomery, state of Ohio, and as said governor was in charge of the eating house of the said Central Branch of the National Home for Disabled Volunteer Soldiers. (3) Said eating house is used by said J. B. Thomas for serving and furnishing to the inmates of said Central Branch of the National Home for Disabled Volunteer Soldiers their daily food or rations, and is the only place so provided at said national home, and is known as the mess room of the said Central Branch of the National Home for Disabled Volunteer Soldiers, situate on the grounds purchased, held, and used by the United States therefor; and the acts complained of herein consisted in causing oleomargarine to be served and furnished, on the 2d day of March, 1897, as food and as part of the rations furnished to the inmates thereof under appropriation made by the congress of the United States for the support of said inmates; and that no placard in size not less than 10x14 inches, having printed thereon in black letters not less in size than 1½ inches square the words 'Oleomargarine Sold and Used Here,' was displayed in said eating house. (4) The affidavit in the cause is made in conformity with an act of the general assem-

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bly of the state of Ohio (Ohio Laws, vol. 92, page 23) entitled 'An act to amend section 3 of an act entitled "An act to prevent fraud and deception in the manufacture and sale of oleomargarine and promote public health in the state of Ohio," passed May 16, 1894': 'Section 1. Be it enacted by the general assembly of the state of Ohio, that section 3 of an act entitled "An act to prevent fraud and deception in the manufacture and sale of oleomargarine and promote public health in the state of Ohio," be amended to read as follows: "Section 3. Every proprietor, keeper, manager or person in charge of any hotel, boat, railroad car, boarding-house, restaurant, eating-house, lunch-counter or lunch-room, who therein sells, uses, serves, furnishes or disposes of or uses in cooking, any oleomargarine, shall display and keep a white placard in a conspicuous place, where the same may be easily seen and read, in the dining-room, eating-room, restaurant, lunch-room or place where such substance is furnished, served, sold or disposed of, which placard shall be in size not less than ten by fourteen inches, upon which shall be printed in black letters, not less in size than one and a half inches square, the words 'Oleomargarine Sold and Used Here,' and said card shall not contain any other words than the ones above described, and such proprietor, keeper, manager or person in charge shall not sell, serve or dispose of such substance as for butter when butter is asked for or purported to be furnished or served." Sec. 2. Section 3 of the above recited act, passed May 16, 1894, is hereby repealed, and this act shall take effect and be in force from and after its passage.' "

By the act of March 3, 1865 (13 Stat. 509), the act of March 21, 1866 (14 Stat. 10), the act of January 23, 1873 (17 Stat. 417), the act of March 3, 1875 (18 Stat. 359), and the act of February 26, 1875 (18 Stat. 524), a national home for disabled volunteer soldiers was established, and the legislation above indicated has been embodied in sections 4825 to 4837, inclusive, of the Revised Statutes of the United States. These sections are now under chapter 3 of title 59 of "Hospitals and Asylums." Section 4825 establishes a board of managers of such home, who are to have perpetual succession, with the power of holding personal and real property, and of suing and being sued. They are also given the power to make rules and by-laws not inconsistent with the law, for the purpose of carrying on the business and government of the home, and to fix penalties thereto. Section 4829 provides that the officers of the home shall consist of a governor, a deputy governor, a secretary, and a treasurer, and such other officers as the managers may deem necessary. Section 4830 provides that the board of managers shall have authority to procure from time to time, at suitable places, sites for military homes for all persons serving in the army of the United States at any time in the War of the Rebellion, not otherwise provided for, who have been or may be disqualified for procuring their own support by reason of wounds received or sickness contracted while in the line of their duty during the Rebellion; and to have the necessary buildings erected, having due regard to the health of location, facility of access, and capacity to accommodate the persons entitled to the benefits thereof. Section 4831 appropriates all stoppages or fines adjudged against officers and soldiers by sentence of court-martial, or forfeitures on account of desertion, and all moneys due deceased officers and soldiers unclaimed for three years after their death, to the establishment and support of the home. The managers are also authorized to receive donations, money, or property for the benefit of the home, and to hold the same for its exclusive use. Section 4832 provides who of the officers and soldiers of the government of the United States shall be

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entitled to the benefit of the national home. Section 4834 provides that the board of managers shall make an annual report of the condition of the home to congress. Section 4835 provides that "all inmates of the National Home for Disabled Volunteer Soldiers shall be subject to the rules and articles of war and in the same manner as if they were in the army." Under the laws of 1865–66 the first board of managers purchased real estate in Montgomery county, near Dayton. Ohio, and there erected buildings to constitute a national home. Since that time branches have been established in Augusta, Me., Milwaukee, Wis., and Hampton, Va. On April 13, 1867, the legislature of Ohio passed the following act:

"Section 1. That jurisdiction of the lands and their appurtenances, which may be acquired by donation or purchased by the managers of the National Asylum for Disabled Volunteer Soldiers within the state of Ohio, for the uses and purposes of said asylum, be, and is hereby ceded to the United States of America; provided, however, that all civil and criminal process issued under the authority, of the state of Ohio, or any officer thereof, may be executed on said lands and in the buildings which may be located thereon, in the same way and manner as if jurisdiction had not been ceded as aforesaid; and provided further, that nothing in this act shall be construed to prevent the officers, employés and inmates of said asylum, who are qualified voters of this state, from exercising the right of suffrage to all township, county, and state elections, in the township in which the said national asylum shall be located."

The second section of the same act exempts all the property, real and personal, held by the board of managers for the uses and purposes of the asylum, from taxation and assessment, "so long as the same shall remain the property of the United States, for the uses of the national asylum."

In Sinks v. Reese, 19 Ohio St. 306, the question arose whether an inmate of the national home at Dayton had the right of suffrage as a citizen of the state of Ohio, and the supreme court of Ohio held:

"The inmates of the home, resident within such territory, being within the exclusive jurisdiction of a government other than that of the state within whose boundaries such asylum or territory may be situate, are not residents of such state, within the meaning of article 5, § 1, of the constitution of Ohio; and where the constitution of such state confers the elective franchise upon residents thereof alone, the inmates of such asylum resident within such territory are not entitled to vote at any election held within and under the laws of such state."

Thereupon congress, by the act of January 21, 1871 (16 Stat. 399), enacted:

"That the jurisdiction over the place purchased for the location of the 'National Asylum for Disabled Volunteer Soldiers' under and by virtue of the act of congress of March third, 1865, entitled 'An act to incorporate a national military and naval asylum for the relief of the totally disabled officers and men of the volunteer forces of the United States' and the act of March 21st, 1866, amendatory thereto and upon which said asylum is located, is hereby ceded to the state of Ohio and relinquished by the United States. And the United States shall claim or exercise no jurisdiction over said place after the passage of this act: provided, that nothing contained in this act shall be construed to impair the powers and rights heretofore conferred upon the board of managers of the National Asylum for Disabled Volunteer Soldiers incorporated under said act, in and over said territory."

In Renner v. Bennett, 21 Ohio St. 431, the supreme court of Ohio, in construing the act of congress of January 21, 1871, held

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that its effect was to restore to the state its jurisdiction over the territory, but without the power to violate the charter rights of the corporation, or rather of the United States, claiming and enjoying them through and by the corporation; thus putting the state in the same relation to this corporation that it sustained towards such of its own corporations as had an irrevocable and inviolable charter, and therefore that the territory upon which the home stood was within the jurisdiction of the state, and the inmates of the home were residents of the state, and were legal voters therein.

It is unnecessary, in my view, to consider the question what is the territorial jurisdiction of the state of Ohio over the land occupied by the national home at Dayton. Let it be conceded that the case presented upon the petition and the facts shown at the hearing is not different from what it would have been had the legislature of Ohio never passed any act ceding jurisdiction to the United States over the land acquired for the purpose of a national military home. In such a case, can it be maintained that the legislature of the state of Ohio may pass an act which shall regulate in any way the manner in which federal governmental functions shall be discharged by the board of managers of the national home as agents of the national government? It is very clear to me that the question must be answered in the negative. Nor can there be any doubt that the acts of the petitioner complained of, and made the ground for prosecution under the state law, were acts in pursuance of the authority of the national government reposed in it by the constitution of the United States. By that instrument congress is given power by taxation to provide for the common defense and general welfare of the United States. It is given power to declare war, to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for calling forth the militia, to suppress insurrections and repel invasions, to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, and to make all laws which shall be necessary and proper for carrying into execution these powers. In the case of U. S. v. Gettysburg Electric Ry. Co., 160 U. S. 668, 16 Sup. Ct. 427, it was held that the act providing for the condemnation of land for the purpose of fencing in and preserving the lines of battle at the battle of Gettysburg, and of making a national park of the same, was within the power of congress. It was objected that the purpose of the act could not be for "the public use," within the powers of the general government. Upon this subject Mr. Justice Peckham, speaking for the supreme court, said:

"Congress had power to declare war, and to create and equip armies and navies. It has the great power of taxation to be exercised for the common defense and general welfare. Having such powers, it has such other and implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect. Any act of congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of this country, and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to

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the exercise of some one or all of the powers granted by congress, must be valid. * * * Can it be that the government is without power to preserve the land, and properly mark out the various sites upon which this struggle took place? Can it not erect the monuments provided for by these acts of congress, or even take possession of the field of battle in the name and for the benefit of all the citizens of the country for the present and for the future? Such a use seems, necessarily, not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted congress by the constitution for the purpose of protecting and preserving the whole country. It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there on those momentous days. By this use the government manifests for the benefit of all its citizens the value put upon the services and exertions of the citizen soldiers of that period. Their successful effort to preserve the integrity and solidarity of the great republic of modern times is forcibly impressed upon every one who looks over the field. The value of the sacrifices then freely made is rendered plainer and more durable by the fact that the government of the United States, through its representatives in congress assembled, appreciates and endeavors to perpetuate it by this most suitable recognition. * * * The right to take land for cemeteries for the burial of the deceased soldiers of the country rests on the same footing, and is connected with and springs from the same powers of the constitution. It seems very clear that the government has the right to bury its own soldiers, and to see to it that their graves shall not remain unknown or unhonored."

The same power that exists to create national parks and to create national cemeteries is exercised in the erection and maintenance of a national home to care for the defenders of the nation, who, though not killed, were disabled and wounded in the defense. The housing and feeding of such persons are, then, a federal governmental function and duty. When the government of the United States purchases land in a state for the purpose of discharging such a duty, it is not within the power of the state legislature to interfere with or regulate the mode in which it shall be performed. What it does for this purpose is exactly as much within its complete control as when its quartermaster furnishes food to its soldiers, or when its pension agents distribute money to its pensioners. It is entirely immaterial in what place, within the jurisdiction of the government of the United States, the duty is discharged. State lines cannot affect or modify the complete control which the federal government and its agents and officers duly authorized have over the manner of discharging it. The jurisdiction of the state government in such a case is excluded not because of the place where the act is done, but because that which is being done is the business of the United States, and such business is as completely beyond the influence and control of the state government as if it were not done within the territory of the state. It is in evidence that in the report made by the board of managers to congress, provided by law, an appropriation was asked for oleomargarine, and that the appropriation was made by congress to cover the proposed expenditure. Would it be contended that, if congress were to pass an act providing that oleomargarine should be served by its quartermaster in the messes of its troops, and a state were to pass a law forbidding the use of it as an unhealthful food, such a law could affect officers obeying the laws of congress in thus furnishing oleomargarine within the state's lines to the military forces of the United

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States, and would subject them to punishment before a state tribunal for violation of the state law? Clearly not. It seems hardly necessary to me to give illustration, to be found in many decisions of the supreme court of the United States, of cases in which it has been held that no state can pass a law which shall in any manner interfere with or prevent the due exercise of its constitutional functions by the United States government through its officers and agents.

In Ex parte Siebold, 100 U. S. 371, 394, Mr. Justice Bradley said:

"It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the states. Here, again, we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to execute its functions in all places does not derogate from the power of the state to execute its laws at the same time, and in the same place. The one does not exclude the other, except where both cannot be executed at the same time. In that case the words of the constitution itself show which is to yield: 'This constitution, and all laws which shall be made in pursuance thereof, * * * shall be the supreme law of the land.' ".

Again, in the case of Tennessee v. Davis, 100 U. S. 257, 262, Mr. Justice Strong, quoting from Martin v. Hunter, 1 Wheat. 363, said: "The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers," and then proceeded:

"It can act only through its officers and agents, and they must act with the states. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court for an alleged offense against the law of the state, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection, if their protection must be left to the action of the state court, the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a state may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the state, but equally federal laws, in such manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested. We do not think such an element of weakness is to be found in the constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the states and upon the people of the states. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it."

The same principle was upheld by Mr. Justice Miller in the case of In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658.

In my judgment, the governor of the soldiers' home was not subject to the law prescribing the manner in which oleomargarine

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should be served in eating houses, not because the place in which he was serving the oleomargarine was without the territorial jurisdiction of the state of Ohio, but because that which he was doing was an act of the government of the United States within its constitutional powers, and wholly beyond the control and regulation of the legislature of the state of Ohio. The petitioner is discharged.

C. H. Bosler and D. L. Sleeper, for appellant.
Judson Harmon and D. W. Bowman, for appellee.

Before LURTON, Circuit Judge, and SEVERENS and CLARK, District Judges.

PER CURIAM. The facts of this case are stated in the opinion of Taft, circuit judge, who heard the case in the court below. His opinion is reported in 82 Fed. 304. With respect to the question of law involved, we concur in the reasoning upon which Judge Taft's opinion proceeds (and which we are content to adopt as our own), and in the conclusion which he reached, save that we prefer to rest our approval of the order made by the court below upon the ground that, inasmuch as the legislature of Ohio had no power to regulate the conduct of this administrative agency of the national government by such a statute as is here in question, it ought to be presumed that the legislature did not intend it to have such an application, and that the statute should be construed accordingly. The order of the court below is affirmed, with costs.

(87 Fed. 498.)

HILL et al. v. KUHLMAN et al.

(Circuit Court of Appeals, Fifth Circuit. May 3, 1898.)

No. 540.

1. CIRCUIT COURT—JURISDICTION.
   A suit to stay an action on the law side of the court for recovery of lands, and to reform a deed thereto, is an ancillary suit, and the court has jurisdiction without regard to the amount in controversy.
2. REFORMATION OF DEED—SUFFICIENCY OF EVIDENCE.
   The evidence showed that the only land owned by grantor was a tract of 250 acres in the Tierwester survey, while the field notes set out in the deed call for a tract of land of 100 acres in another survey, not then owned by grantor, and that, if the notes in the deed are reversed, they will substantially describe the 250 acres owned by the grantor; that, since the deed, the grantee and his successors have claimed and controlled the 250 acres in the Tierwester survey, while during this time the grantor or his successors have made no claim to it. *Held* sufficient to sustain a decree, in a suit brought 50 years after the deed, that such deed be reformed to cover the 250 acres in the Tierwester survey.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

S. W. Jones and Geo. H. Breaker, for appellants.
S. R. Perryman and A. C. Bullitt, for appellees.

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Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PARDEE, Circuit Judge. This is an appeal from a decree on a bill brought to stay proceedings in an action on the law side of the circuit court, instituted for the recovery of certain lands, and to reform a deed from one John Y. Hill, the common source of title of both parties in the law action, to one Sanford J. Poston, the complainants' grantor, which deed was made on the 15th day of May, 1840. On the hearing, a decree was entered in favor of the complainants, reforming the deed in question as prayed for, and remitting the parties on the question of title to the action at law. To this decree the defendants below (appellants here) assign error as follows:

"(1) The evidence, as shown by the record in this case, fails to disclose such a state of facts, positive or circumstantial, as would justify a court of equity in adding to, correcting, changing, or modifying the language of a written instrument expressive of a contract solemnly entered into between the parties; and the said circuit court of the United States erred, to the prejudice of the said James H. Hill, Bell B. Pusey, Hill Hastings, Thomas H. Hastings, and Alfred Hastings, in holding, adjudging, and decreeing that a mutual mistake had been made by the grantor, John Y. Hill, and the grantee, Sanford J. Poston, in the field notes of the deed of conveyance, of date May 15, 1840, from the former to the latter, for a certain tract of land, being the land in controversy in this suit, situated in the county of Harris, then republic of Texas, but now the state of Texas, and in so correcting the field notes of said deed as to convey two hundred and fifty acres of land, instead of one hundred acres, as expressed in and by the field notes set out in said conveyance. (2) And other errors manifest of record."

This assignment of error amounts to no more than that the court below erred on the merits of the case. Counsel for appellants, however, by brief, present in this court the question of jurisdiction, want of equity in the bill, and insufficient evidence to support the decree. It is urged that the record does not show that the value of the subject-matter in controversy is within the court's jurisdiction. As the suit is one to stay proceedings at law, and could only be brought in the court a qua, the suit is an ancillary suit, and the jurisdiction of the court is clear. The want of equity in the bill is alleged, because the allegation of mutual mistake is not direct and positive in terms; and generally it is claimed that the bill and the amendment thereto wholly fail to state such a case as would authorize the correction or reformation of a written instrument executed more than 50 years ago, because it is said that the mutual mistake is not directly averred, but only on information and belief.

As we read the original bill of complaint, we find that the mutual mistake in the deed from Hill to Poston, which is the deed sought to be reformed, is fully described, and is sufficiently charged to support a decree in favor of complainants. If the objection had been made and insisted upon in limine, it could, if sound, have been easily cured by amendment. Whether a deed should be reformed on proof of mutual mistake after 50 years depends upon the peculiar circumstances attending the case. On the facts stated in the original bill and the amendment thereto, laches is not imputable to the complainants in this case.

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On the merits, we find the allegations of the bill sufficiently established to warrant the decree appealed from. The mutual mistake alleged in the bill is in regard to the field notes given in connection with a description of the land. The case shows that while John Y. Hill owned a tract of land in the county of Harris, 1½ miles from the city of Houston, being the southeast half of the Tierwester survey, he did not own any other land in that county; and that the deed purported to convey 250 acres off the Tierwester survey, while the field notes set out in the deed call for a tract of land of about 100 acres in another survey, not then owned or controlled or claimed by Hill; and that, if the field notes in the deed are reversed, they will substantially describe the 250 acres owned by Hill at the time of the conveyance; and that, from the time of the conveyance to Poston down to the present time, Poston and his grantees have claimed, controlled, and more or less occupied the 250 acres in the Tierwester survey, paying all taxes thereon, and as fully possessing the same as the circumstances permitted, while during all this time neither Hill nor his heirs nor other grantees have made any claim whatever to said lands. The case further shows that, in other deeds made by the said Hill about the time of the deed to Poston, he conveyed other portions of the same tract, reducing his holdings therein to the 250 acres sold to Poston, and in one of the deeds the land sold to Poston is referred to as being in the Tierwester survey. While it is possible that John Y. Hill, while pretending to sell 250 acres of land to Poston for a consideration of $1,500, may have intended in describing the land to insert field notes which did not refer to any land he owned, yet it is not probable nor to be presumed in a court of equity, in the absence of proof. All the circumstances established by the evidence point to the fact that the insertion of such field notes was a mistake.

The decree of the circuit court seems to be just and equitable, and we see no reason to disturb it. Affirmed.

(87 Fed. 500.)

LOUISVILLE & N. R. CO. et al. v. CENTRAL TRUST CO. OF NEW YORK et al.

(Circuit Court of Appeals, Sixth Circuit. June 1, 1898.)

No. 553.

1. RAILROADS—RECEIVERS—CLAIMS FOR TRACK RENTALS.
   A claim against a railroad company which is in the hands of a receiver under foreclosure proceedings, for rent of track privileges accruing prior to the appointment of the receiver, is not entitled, as against the mortgage bondholders, to priority of payment out of the proceeds of sale, where no special equities are shown, and it appears that the lessor relied for payment upon the general credit of the lessee and its sublessee.

2. SAME.
   Track rentals are not in general recognized as of the kind of claims which may become entitled, on the appointment of a receiver, to priority over the mortgage bonds.

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Appeal from the Circuit Court of the United States for the District of Kentucky.

This is a suit upon the intervening petition of the Louisville & Nashville Railroad Company and the Kentucky Central Railroad Company, filed in the circuit court for the district of Kentucky, in a consolidated suit in equity there pending, consisting of two original cases, one being brought by Samuel Thomas, a creditor of the East Tennessee, Virginia & Georgia Railway Company, and the other a suit by the Central Trust Company of New York, for the foreclosure of a mortgage given by the Louisville Southern Railroad Company to secure its bonds. This petition was presented for the purpose of enforcing a preferential claim upon the fund arising from the sale of the mortgaged property. The claim is founded upon the following facts:

Prior to January 29, 1890, the Newport News & Mississippi Valley Company was operating a railroad running from the East into Lexington, Ky., and stopping at Merino street, in that city, where it had a station. The Kentucky Central Railroad Company also had a line of road running into the city from the north until it reached a point on the west side of Cox street, nearly due west of the station of the Newport News & Mississippi Valley Company, from which point it turned to the east, and extended to the station mentioned. The Louisville Southern Railroad Company had built a railroad from Louisville to Lexington which entered the last-named city from the southwest to a point of junction with the Kentucky Central Railroad at the curve near Cox street, where the Kentucky Central Railroad turned east, as above stated. The Louisville Southern Railroad had no station at Lexington, and it desired to form a connection with the Newport News & Mississippi Valley Company's road. Accordingly, it entered into a contract on the 29th day of January, 1890, with the Kentucky Central Railroad Company, for the use of that company's track from the point of junction of their lines to the station of the Newport News & Mississippi Valley Company, and for certain terminal facilities in the immediate locality. This contract provided, among other things not necessary to be mentioned here, that the Louisville Southern Railroad Company should pay for the use of this portion of the Kentucky Central Railroad Company's track at the rate of 75 cents for each of its cars passing over it, and that all sums due under the contract should become payable during the month following that in which the service was rendered. The contract was to last for the period of 25 years. The Louisville Southern Railroad Company began to use the track under this contract in the latter part of March, 1890. Very soon after that a controversy arose as to whether the contract contemplated payment for the trackage for empty cars. The controversy continued, and the monthly payments were, in consequence, not paid.

On June 27, 1890, the Louisville Southern Railroad Company leased its railroad and assigned the benefits of the above-stated contract to the East Tennessee, Virginia & Georgia Railway Company, and the latter company immediately went into possession of the leased property, and continued to use the track of the Kentucky Central Railroad Company. The above-stated question of the construction of the contract continued unsettled. Matters went on in this way until September, 1891, when the Kentucky Central Railroad Company sold out all its property and contract rights to the Louisville & Nashville Railroad Company, including those inuring to it under the contract with the Louisville Southern Railroad Company. The use of the track continued by the lessee of the last-named company, and without any adjustment of the controversy as to the meaning of the contract under which the privilege was enjoyed. Finally, on the 2d day of May, 1892, the Louisville & Nashville Railroad Company, together with the Kentucky Central Railroad Company, brought suit against the Louisville Southern Railroad Company and its lessee, the East Tennessee, Virginia & Georgia Railway Company, in the circuit court for Fayette county, Ky., to recover for the use of the track from the beginning. This suit remained pending until June 23, 1894, when judgment was rendered for the use of the track by loaded cars against the Louisville Southern Railroad Company during the period prior to the date of the lease, and against both defendants from the date of the lease to the commencement of the suit, rejecting the claim for empty cars. While this suit was

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pending, and on the 25th day of June, 1892, the suit of Thomas against the East Tennessee, Virginia & Georgia Railway Company was commenced in the circuit court for the district of Kentucky, and a receiver was appointed, who took possession of the railway company's property and exercised the privileges of the trackage contract. Not long afterwards the Central Trust Company of New York commenced suit in the same court against the same company to foreclose a mortgage given by the company to secure its bonds. The two suits were consolidated, new receivers were appointed, and the former receivers were directed to turn the property over to them. On the 1st day of July, 1893, the East Tennessee, Virginia & Georgia Railway Company failed to pay the rent due the Louisville Southern Railroad Company, and the latter company made default in the payment of the interest due on its bonds. On the 3d day of the same month the Central Trust Company of New York commenced suit to foreclose a mortgage given by the Louisville Southern Railroad Company to secure the bonds, and incidentally praying that the lease above mentioned might be canceled. Receivers were appointed in this suit, and the receivers in the consolidated causes against the East Tennessee, Virginia & Georgia Railway Company were ordered to turn over to them the property of the Louisville Southern Railroad Company, which they had theretofore had in their possession, and the new receivers were ordered to pay and be answerable for all just claims against the receivers for the East Tennessee, Virginia & Georgia Railway Company, growing out of their operation of the Louisville Southern Railroad. The several receivers above mentioned continued to use the connecting track under the contract of January 29, 1890.

On November 3, 1894, having obtained their judgment in the Fayette county circuit court as above stated, these petitioners filed their petition of intervention in the court below, reciting the substance of the foregoing statement, stating the situation of the several railroads with reference to each other, and the necessity of the connecting track in the operation of the Louisville Southern Railroad, and, by amendment of the petition, the diversion of earnings, both before and after the appointment of the receivers, to the payment of interest on bonds, and to the purchase of equipment and the betterment of the property; and the petition prayed for payment, out of the proceeds of the sale of the Louisville Southern Railroad property, of the amount alleged to be due for the use of the petitioners' track during the several periods of such use,—first, by the Louisville Southern Railroad Company from the latter part of March, 1890, to June 27, 1890; second, by the East Tennessee, Virginia & Georgia Railway Company from June 27, 1890, to June 25, 1892; and by the receivers after the last-named date. The interveners' claim was referred to the special master, W. O. Harris, to whom all other claims against the fund had already been referred. The master reported, in favor of the interveners, for the use of the track during all the periods for which claim was made, sums amounting, with interest, after deducting some payments, to $5,759.80, upon findings that the trackage was at all times a necessity to the profitable operation of the road, and that there were continuously large diversions of current earnings, more than sufficient to pay all current operating expenses, and that, therefore, the claim was entitled to priority of payment. Exceptions were filed to the allowance of this claim as one entitled to preference over that of the bondholders. At the hearing the court, in effect, sustained the exceptions so far as they related to the claim for track service prior to the date when the receivers took possession of the Louisville Southern Railroad, June 25, 1892, and overruled them so far as they related to the use of the track by the receivers after that date. A decree was entered accordingly, and the interveners have appealed from so much of the decree as disallows priority to the claim for track service while it was used first by the Louisville Southern Railroad Company, and afterwards by its lessee, the East Tennessee, Virginia & Georgia Railway Company.

Helm Bruce, for appellants.

A. P. Humphrey, for appellees.

Before LURTON, Circuit Judge, and SEVERENS and CLARK, District Judges.

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SEVERENS, District Judge, having stated the case as above, delivered the opinion of the court.

As will be seen from the foregoing statement of the facts, the circuit court directed that compensation be made for the use of the track, in accordance with the terms of the contract, during the time when the court had possession of the property. We have, therefore, only to determine whether or not the court was right in disallowing priority to the interveners' claim for the track service from the latter part of March, 1890, to June 27, 1890, that being the period of the Louisville Southern Railroad Company's occupation, and also during the second period, from June 27, 1890, to June 25, 1892, while the track was in use by the East Tennessee, Virginia & Georgia Railway Company. It will be noticed from these dates that the use by the first-named company terminated two years prior to the time when the receivers were put in possession. It was found and reported by the master that during this first period, the claim for which we are now considering, the current net earnings were more than sufficient to pay this claim; and it also appears that surplus earnings were paid over to the bondholders for interest, or appropriated to the purchase of equipment and for improvements of the road. Upon such facts it is contended by the counsel for the appellants that the proceeds of the sale of the mortgaged property may be appropriated to the interveners' claim for that period, notwithstanding the lapse of time intervening between the termination of it and the commencement of the foreclosure proceedings. But it would be unprecedented for the court, upon these facts merely, to concede the priority of a claim of such a character. There is no proof in the record to show that at the time in question the Louisville Southern Railroad Company was insolvent or approaching or apprehending insolvency. The principal of the bonded debt, secured by its mortgage, was not due, the interest was being paid, and there was no ground for any action of the trustee towards foreclosure. There was, therefore, no delay which enabled the mortgagor to disappoint its creditors. There is nothing to show that the Kentucky Central Railroad Company relied upon, or had any reasons for relying upon, the then current earnings as the source from which these track rentals were to be paid, and there was nothing in the nature of an equity which gave it any right to have those earnings applied in satisfaction of the installments of rent as they fell due. In fact, there was no equitable circumstance which does not exist in every case where a debtor applies his current income to the payment of one creditor rather than another.

Again, in order to constitute an equitable claim upon the current income, it must appear that the creditor asserting the claim did, in fact, or presumably, rely upon an expectation of being paid out of that fund. In the present case it is shown that from the beginning there was a question pending between the Kentucky Central Railroad Company and the Louisville Southern Railroad Company in regard to the construction of the contract on which the amount to be paid under the contract was to be ascertained. The parties took no steps at that time to have the question determined, and appear by mutual consent

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to have let its determination remain in abeyance. This action shows clearly enough that the Kentucky Central Railroad Company did not rely upon or expect payment for this track service at the time or out of the current earnings, but must have understood that payment was postponed until some future time. It is a hopeless proposition to say that any equitable charge upon the current income arose upon facts like these. None of the facts upon which equitable claims have been maintained in suits of this character existed. All of the cases, from Fosdick v. Schall, 99 U. S. 235, to the present time, in which such claims have been recognized as having priority, rest upon the fundamental ground that there were peculiar circumstances, out of the ordinary course of business, which gave rise to a special equity, which it was the duty of the court to enforce.

With respect to the claim of priority for the track rentals during the period from June 27, 1890, to June 25, 1892, while the East Tennessee, Virginia & Georgia Railway Company was operating as lessee the road of the Louisville Southern Railroad Company, many of the above and still other considerations are presented. The lessee company was using this piece of track for its own purposes and its own business. It is true that, in a strictly legal sense, the lessor continued to be bound by the obligations of the contract; but, having assigned its interest therein to the East Tennessee, Virginia & Georgia Railway Company, with the knowledge of the Kentucky Central Railroad Company, followed by the recognition by the latter company of the assignment, the lessor company stood in the relation of surety for the payment of these charges. It did not control the operation of the road and had no control of the disposition of its earnings. During the foreclosure proceedings resulting in the sale of the property of the East Tennessee, Virginia & Georgia Railway Company and the distribution of its assets, this claim was not presented to the court, nor was any attempt made to collect it. It was known to all parties that the position of the Louisville Southern Railroad Company was that of surety merely. We do not say that the mere failure to assert this claim against the assets of the East Tennessee, Virginia & Georgia Railway Company during its winding up would, in and of itself, be a bar to the prosecution of the same claim against the surety if inherently it were one of an equitable character, but it is one of the circumstances which a court of equity may properly regard as having some bearing upon this claim as urged in the present condition of affairs. But beyond all this, and with respect to the claim for both of the periods we have been considering, the nature of the claim itself is of a kind which, upon the general current of authority upon the subject, disentitles it to a position of priority over the mortgage debt. It appears to us to stand upon no higher or better ground than claims for rentals of rolling stock, which are quite as indispensable to the daily operations of a railroad as are its tracks; and, with respect to track rentals for the period prior to the accession of the receiver, they are not, as a general rule, recognized as entitled to priority. Thomas v. Car Co., 149 U. S. 95, 13 Sup. Ct. 824.

The facts in the present case clearly indicate that the Kentucky Central Railroad Company placed its reliance upon the general credit

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of the Louisville Southern Railroad Company and of the East Tennessee, Virginia & Georgia Railway Company, rather than upon the expectation of displacing the priority of the mortgage lien, to adopt the language of Mr. Justice Shiras, in delivering the opinion of the supreme court in the case of Thomas v. Car Co.; or, as he elsewhere puts it in the same opinion, "must be regarded as contracting upon the responsibility of the railroad company, and not in reliance upon the interposition of a court of equity."

It further remains to be observed that much the larger portion of the interveners' claim is excluded by the operation of the rule in respect to the length of time prior to the appointment of a receiver the court will regard in the adjustment of equities of this sort. But for the reason that, upon the grounds already considered, we think no part of this claim can be given preference, it is not necessary to draw a line of discrimination or to canvass the rule upon this subject. It was discussed upon this, as well as several other of the aspects of this case, by Judge Lurton in delivering the opinion of this court in the case of Central Trust Co. of New York v. East Tennessee, V. & G. Ry. Co., 26 C. C. A. 30, 80 Fed. 624. There is no error in the decree appealed from, and it is affirmed, with costs.

(87 Fed. 505.)

NORTHERN ALABAMA RY. CO. v. HOPKINS.

HOPKINS v. NORTHERN ALABAMA RY. CO.

(Circuit Court of Appeals, Fifth Circuit. May 3, 1898.)

No. 638.

1. RECEIVERS—EXPENSES—ESTOPPEL.
   The receiver of a railroad, at the instigation of the bondholders, made several trips to Europe, in an effort to get the property out of its embarrassed financial condition. *Held*, that the bondholders were estopped to complain of the allowance of the receiver's expenses for such trips out of the proceeds of the sale of the property under a decree of foreclosure.
2. SAME.
   And the purchasers under the sale had no interest to contest the allowance of such expenses.
3. SAME.
   Traveling expenses of a receiver of a railroad, incurred in going to and from his residence to the railroad property, and elsewhere about the country, in the interests of the property, are properly allowed.
4. SAME—FINDINGS OF LOWER COURT—REVIEW.
   Unless injustice clearly appears, the findings of the lower court allowing receiver's expenses and fees will not be disturbed on appeal.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

Exceptions by J. Kennedy Tod, John G. Leiper, and the Northern Alabama Railway Company, as purchasers of the property of the Birmingham, Sheffield & Tennessee River Railroad Company at foreclosure sale, and by E. A. Hopkins, receiver of said company, to the master's report, allowing fees and expenses to said receiver. The

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report was modified, and the Northern Alabama Railway Company appealed, and E. A. Hopkins filed a cross appeal.

Geo. L. Rives and Girault Farrer, for Northern Alabama Ry. Co.
J. F. Martin and E. B. Kruttschnitt, for E. A. Hopkins.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PARDEE, Circuit Judge. The Birmingham, Sheffield & Tennessee River Railroad Company, a corporation organized under the laws of Alabama, owned and operated a railroad from the town of Sheffield, Ala., to the town of Parish, on the line of the Georgia Pacific Railroad, running through some five counties in the state of Alabama. April 1, 1889, the said company executed to the Knickerbocker Trust Company, a New York corporation, a deed of trust under which $2,975,000 of bonds were issued to the Sheffield & Birmingham Construction Company, which bonds were by the last-named company afterwards hypothecated to various parties. On June 1, 1893, the railroad company having been in default in the payment of interest on the aforesaid bonds for more than a year, the Knickerbocker Trust Company filed its bill in the court a qua, asking for the appointment of a receiver, the foreclosure of the trust deed, and a sale of the mortgaged premises. The railway company answered the bill, admitting all its allegations; whereupon, on June 7, 1893, the court appointed E. A. Hopkins, a citizen of Philadelphia, receiver of all the property of the Birmingham, Sheffield & Tennessee River Railroad Company. The evidence shows that Mr. Hopkins was selected as receiver by and through the consent of the parties in interest. The receiver, having filed his bond, on June 16, 1893, took possession of the railroad, and thereafter held and operated the same, under the direction of the court, until November 30, 1895, when he turned over the property to the purchasers thereof. A decree of foreclosure and sale was entered in favor of the Knickerbocker Trust Company on July 5, 1895, by the terms of which it was ordered that the railroad should be sold by a commissioner therein appointed; that the purchasers should pay to the commissioner the sum of $50,000 in cash; that the purchasers should be entitled, in the settlement of the balance of the purchase price, to turn in or use receiver's certificates, or other valid claims against the receiver, or bonds of the railway company; that the receiver should not receive any bid for a sum less than $500,000; that the proceeds of the sale were to be applied to the payment of the expenses of the sale and the debts and liabilities incurred by the receiver in the operation of the railway property, including a reasonable allowance to the said receiver for his compensation and for his attorney, the clerk's fees, the charges of the trustee and its counsel, all such sums as might by subsequent orders in the cause be declared to be payable out of the purchase money and be prior in lien to the bonds secured by the mortgage and deed of trust, the bonds, coupons, and interest thereon secured by the first mortgage in full, or, if there be not sufficient, a pro rata amount thereon, and to the payment of the balance, if any, into court. The railroad was sold under said

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decree on September 16, 1895, to J. Kennedy Tod and James J. Leiper, who duly complied with the terms of sale. On October 29, 1895, the sale to Tod and Leiper was confirmed, and a deed ordered, and in the decree to that effect the following provision is found:

"And that the said purchasers, J. Kennedy Tod and James J. Leiper, and their heirs and assigns, be, and they are hereby, allowed to appear, either in person or by attorney, before the said special master, and also before the court, in any and all proceedings wherein and whereby any claim against said Birmingham, Sheffield & Tennessee River Railroad Company, or the receiver of said company, is sought to be declared to be payable out of the said purchase money, or to be prior in lien to the mortgage bonds of said railroad company; and the said purchasers, and their heirs and assigns, shall have the right to appeal from all decrees in such cases to the same extent as the original parties to the said suit."

On January 9, 1896, the receiver presented his final report, accompanied by a statement of his personal expenses, and a petition asking for compensation, and the appointment of a master to determine the amount thereof. Upon this petition, a decree of reference was entered the same day containing the following provision:

"It is further ordered and decreed that the said master shall be empowered to hear the testimony of such witnesses as the petitioner and said parties may cause to be brought before him, and such other testimony as may be legally admissible in such cases, and from such testimony to find, fix, and determine the amount of the said receiver Edmund A. Hopkins' compensation, and that he report the amount of his findings to this court by the 27th day of April, 1896."

After taking much evidence, the master filed an elaborate report, recommending that the receiver be allowed for compensation as receiver the sum of $20,000; for personal expenses,—trips to Europe $3,150, and for other personal expenses $3,022.50,—making a total of $26,172.50, subject to a credit of $6,127.82. To this report exceptions were filed by J. Kennedy Tod and John G. Leiper and the Northern Alabama Railway Company, as purchasers of the railway property at the foreclosure sale. The grounds of the exceptions were that personal expenses should not have been allowed at all, because no itemized accounts were presented, nor vouchers produced, nor were said expenditures necessary; and that the compensation of $20,000 is excessive, and not warranted by the testimony. Hopkins, the receiver, also filed exceptions to the report, claiming that the sum allowed him as compensation was inadequate and not reasonable. The exceptions to the master's report were heard before the court, all parties being represented by counsel; whereupon the court, being of opinion that the $20,000 allowed the receiver for compensation was excessive, and that the sum of $5,000 per year would be a just and reasonable compensation, maintained the exceptions filed by the purchasers to that extent, but otherwise overruled all exceptions, and entered a decree accordingly. From this last decree the Northern Alabama Railway Company, as purchaser, appealed, assigning as error the allowance by the special master and the court of the personal expenses claimed by the receiver. Only the Northern Alabama Railway Company and E. A. Hopkins were made parties. Hopkins entered a cross appeal against the Northern Alabama Railway Company solely, assigning as error that the court erred in overruling the

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receiver's exceptions, and reducing the amount of compensation as allowed by the special master.

The evidence shows that the master reports that the expenses of the receiver in his several trips to Europe were incurred while the receiver was visiting Europe in the interest and at the instigation of the bondholders, and with the consent of the stockholders of the railway company, to try and bring about a reorganization which would get the property out of its then embarrassed financial condition, and complete the railroad in accordance with its original design; and that it was then believed by all the parties that the receiver, because of his knowledge of the subject, would be the best person who could be selected to present the plans to those who were already interested in the property as well as to those from whom it was hoped additional capital could be obtained.

Without seriously denying this evidence, the appellant contends that the business was entirely outside of the receiver's duties under the order of the court, which, it is claimed, were limited to managing and operating the railroad, keeping it open as a public highway, and to collecting money due to the company; and that, as the endeavors to successfully reorganize the property were fruitless, the expense cannot be allowed, particularly as against Tod and Leiper and the Northern Alabama Railway Company, purchasers of the property. On the other hand, it is contended that Leiper and Tod were really a purchasing committee, representing all the bondholders, and that, as the expenses were incurred in the interest of and with the consent of the bondholders, they cannot be allowed to object to the expense; and it is further contended that it was proper for the receiver to act in conjunction with, and in the interest of, all the bondholders, to endeavor to bring about a reorganization of the property. As to these expenses the special master reports as follows:

"It further appears from the testimony given and the papers filed in this matter that, while this suit was in progress, several plans were set on foot, or attempted to be set on foot, between Messrs. J. Kennedy Tod and John G. Leiper, representing the bondholders, and the receiver, and with the consent of the stockholders of the railroad, to get the property out of its then condition, and complete it, in accordance with its original design, into Birmingham, and extending it to Riverton; and that it was then believed that, because of his knowledge of the subject, the receiver in this cause would be the best person who could be selected to present the plans to those who were already interested in the property, as well as to those from whom it was hoped the necessary additional capital could be obtained; and that, pursuant to that understanding, Mr. Hopkins made three trips to Europe, as testified to by him, and which were fully known by Messrs. Tod and Leiper. It cannot be believed that it was understood by those parties that Hopkins was making these trips, or 'excursions,' as counsel for the railway company term them, with the intention or expectation of paying his own expenses. He had no interest in the property, either as bondholder or stockholder, and, although he admits an interest in the property by reason of the stock in the railroad company belonging to his friends, it could hardly be supposed that his friendship would be carried to the extent of his paying out $3,150, when the property involved was first called upon to pay off the claim of the bondholders, amounting to about $1,700,000, together with all prior claims and the costs of this litigation, before anything could possibly be realized upon the stock in the railroad. It might be argued that there may have been some other plan understood between Mr. Hopkins and these representatives of the bondholders looking to his compensation in this regard, and a repayment of his ex-

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penses, but if such a plan existed it might well be presumed they would have made it known on the hearing. Nor can I find, after careful perusal of the plans of reorganization filed as part of the testimony in this cause, any provision by which any compensation for payment of expenses is made to Hopkins. Of course, the distinction must be kept in mind that, even if it had been agreed between the parties to the litigation that provision should be made by the court to pay the receiver's expenses of this character, and that, without notice of such a claim, third persons should have bought the property under the decree rendered in this suit, it might be doubted if the court would impose these expenses as a prior claim under its decree; but in this case the purchasers of the property were the same parties with whom all prior transactions had been had, and they had acted with the receiver in his efforts to put the property on its feet, and they would have been the beneficiaries had his and their efforts been successful. It seems that it would be just and equitable that the amount shown to have been expended on these trips, about which there was no contention, should be allowed. It is shown that the Northern Alabama Railroad Company simply stands in the 'shoes' of Messrs. J. Kennedy Tod and John G. Leiper, the purchasers of the railway property, who themselves represented the bondholders of the Birmingham, Sheffield & Tennessee River Railway Company, and that they assigned their bid to said Northern Alabama Railway Company, which is a new corporation, organized for the purpose of operating the purchased property."

The view we take is that, under the circumstances reported by the special master, the bondholders are estopped to deny the propriety of the expenses incurred by the receiver at their own instance and for their own benefit, and that the purchasers of the railway property under the decree of foreclosure and sale, as such, have no interest to contest the expenses of the receiver. The other expenses of the receiver which are contested appear to have been incurred by the receiver in traveling to and from his residence to the railway property and elsewhere about the country, in the interest of the railway property in his custody. As the evidence shows that such traveling was necessary in looking after the involved interests of the railway property in his charge, we are of opinion that they were properly allowed, and we take this view the more readily because, generally, in such cases, the expenses allowed receivers of railway property are so identified with the matter of compensation as to ordinarily affect, if not control, the allowance made by the court. The receiver's compensation, as fixed by the circuit court, appears to be reasonable, under the evidence. Certainly, it cannot be held excessive on appeal, for we cannot say that it was unjust, insufficient, or unreasonable.

We had occasion to declare the rule in matters of this kind in Gaines' Adm'r v. Mills' Ex'rs, 13 U. S. App. 229, 235, 4 C. C. A. 521, 525, and 54 Fed. 614, 617:

"Appellate courts are generally not disposed to disturb the findings of the lower courts in the matter of compensation for services of trustees, solicitors, receivers, and masters rendered in the conduct of litigation in said courts, whether based on findings of masters or verdicts of juries, unless injustice clearly appears, for the reason that the court below should have considerable latitude of discretion on the subject, since it has far better means of knowing what is just and reasonable than an appellate court can have. See Trustees v. Greenough, 105 U. S. 527, 537; Cowdrey v. Railroad Co., 1 Woods, 331, 341, Fed. Cas. No. 3,293; and Head v. Hargrave, 105 U. S. 45."

We have been furnished with no authority to justify us in departing from the rule above declared. We do not find it necessary to

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pass upon the question, much argued in the briefs, whether it is proper to permit a receiver of the court to participate in schemes of reorganization. Nor do we decide that the appellant has on the record an interest sufficient to warrant his appeal (but see Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207, 222, 10 Sup. Ct. 736), nor that either the appeal or cross appeal was properly taken. The decree of the circuit court is affirmed.

(87 Fed. 512.)

DAVIS v. PORT ARTHUR CHANNEL & DOCK CO.

(Circuit Court of Appeals, Fifth Circuit. May 18, 1898.)

No. 699.

1. CORPORATIONS—TEXAS CHANNEL AND DOCK COMPANIES—POWERS.
   A channel and dock company organized under Sayles' Ann. St. (Tex.) 1897, §§ 721, 722, and authorized to construct a channel "across, along, through, or upon" certain waters within the jurisdiction of the states, is not restricted to a route through such waters, but may construct its channel along the borders of the same.

2. INJUNCTION PENDENTE LITE—CONDEMNATION PROCEEDINGS.
   An application for an injunction pendente lite is addressed to the sound discretion of the court, and will be granted only to prevent irreparable injury; hence a corporation having instituted proceedings for the condemnation of land, and a controversy having arisen as to the value thereof, an injunction will not issue to restrain the corporation from entering upon the land until the termination of the condemnation suit, where the corporation has given bond in a sum sufficient to cover all damages, and the whole controversy appears to be rather an attempt to defeat the purpose of the corporation than a simple contest as to the value of the land.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

This is an application by the appellant, Davis, in the United States circuit court for the Eastern district of Texas at Beaumont, for an injunction restraining the appellee, the Port Arthur Channel & Dock Company, its agents and employés, from entering or remaining upon two certain tracts of land in which the appellant owns an undivided interest, and from the prosecution of any work or construction on any part thereof, or from doing any act in jeopardy of plaintiff's right and peaceable possession of said premises pending the adjudication of the rights of the plaintiff and the defendant in a common-law cause in said court, in which the defendant company was seeking to condemn said land for the purpose of cutting a channel through it. Plaintiff's land is described as an undivided one-eighth interest in divisions A and 6 of a tract of land on the west side of and upon the waters of Sabine Lake and Sabine Pass, known as the "Dennis Gahagan League" of land. The common-law case referred to is a proceeding which was originally commenced in the county court of Jefferson county, Tex., by the appellee, to condemn said land for the purposes of said channel company, both as to the construction of its channel and for a right of way on each side of it. That suit was removed to the United States circuit court at Beaumont after the commissioners appointed by the county judge for that purpose had awarded damages to appellant, and the amount had been paid into the county court, and the appellant had filed his objections to the award, and the proceedings had become a case in court for trial as in other causes, and this application was filed after said removal. The grounds of the application are, briefly, as follows: "(1) The charter of the Port Arthur Channel and Dock Company is void,

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because it authorizes the construction of its channel from the waters of the Gulf of Mexico, at Sabine Pass, along and across Sabine Lake to a point at or near the town of Port Arthur; and Sabine Lake is a body of water not within the jurisdiction of the state of Texas, and said charter is not, therefore, authorized by the constitution and laws of the state of Texas nor of the United States, but in contravention thereof. (2) Said charter contemplates the construction of a channel through the waters of Sabine Lake, not to enter the mainland until it reaches a point at or near the town of Port Arthur, whereas the route of the channel, as designated by said company, does not touch Sabine Lake, but enters the mainland before reaching said lake, and continues through the mainland until it reaches Taylor's Bayou, a navigable stream, and, after crossing the same. extends to the town of Port Arthur. (3) The usefulness of Taylor's Bayou as a navigable stream would be destroyed by cutting the channel into it, as its waters would be diverted from their natural course into the Port Arthur channel, and its depth would be reduced, and no permit had been obtained from the United States government for the construction of the channel. (4) There was no necessity for cutting the channel where the company proposed to construct it—between Taylor's Bayou and its southern terminus—for the purpose of reaching a safe place for wharfs and docks; that Port Arthur is nine miles in a northerly direction from where the channel enters the mainland, and the entire property between the two points is comparatively level, the height at Port Arthur being about the same as at the southern terminus of the channel. (5) In the condemnation suit pending between the parties hereto the commissioners had reported the damages of appellant by reason of the condemnation of his land to be $281.60, and appellant had filed exceptions to said award, and these objections were still pending, and had not been determined, and the cause stood for trial de novo, and the award had been set aside and held for naught, and appellee had no right to enter upon said land until said proceedings should be finally determined." Irreparable injury to appellant's land was alleged, and an injunction was prayed for as already stated. A restraining order was granted by Hon. A. P. McCormick in terms conforming to the prayer for injunction, to continue until the further order of said circuit court or one of its judges, and the appellee was directed to appear before said circuit court at Galveston on February 28, 1898, to show cause, if any it could, why the preliminary injunction should not be granted. On the day named the appellee appeared, and filed his reasons why the injunction should not be granted, substantially as follows: "(1) That the bill showed no equity on its face. (2) The charter attached to the bill showed the right of the company to condemn the land. (3) Bill showed adequate remedy at law through the condemnation proceedings, and did not allege insolvency of defendant. (4) Charter showed defendant worth a half million dollars, and no irreparable injury was shown, and all questions in the case could be tried in the condemnation suit. (5) The bill did not show that the plaintiff had land on Taylor's Bayou, and, if it did, the United States government only could object to any injury done to that stream. (6) The amount assessed by the commissioners as damages to plaintiff's land had been deposited in court for the benefit of plaintiff. (7) Res adjudicata in this: that in equity No. 1, in the United States circuit court at Beaumont, the matters set up in plaintiff's bill had been adjudicated against him. (8) Plaintiff's land was of but little value, and had never been used by him for any purpose. (9) The defendant had a permit from the United States government to cut its channel through 200 feet of the water of Sabine Pass to where it enters the mainland. (10) Defendant admitted its incorporation as charged; also, that the legal title to the land was in plaintiff; the filing of condemnation proceedings; award as stated; alleged payment of that amount into court; admitted the removal of the cause to the United States court as charged; the filing of objections to the award by plaintiff; that the channel would cross Taylor's Bayou; but denied that that stream was navigable, or that injury would result from cutting the channel into it; alleged conspiring of plaintiff with Kountze Bros. to defeat the construction of the canal; and denying other allegations of the bill; asked to give bond to pay any damages that might be assessed in the condemnation suit, and to proceed with the construction of the canal through plaintiff's land." The case was heard, the preliminary injunction prayed for was refused, and the

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defendant permitted to proceed with the work of digging the channel upon giving a bond in the sum of $5,000 conditioned as asked by defendant.

A. H. Willie, for appellant.

Hal. W. Greer and R. A. Greer, for appellee.

Before PARDEE, Circuit Judge, and SWAYNE and PARLANGE, District Judges.

PARDEE, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

No written opinion having been given in the court below, the appellant has assigned errors covering all possible views and rulings of the judge a quo, but from the view we take of the case the right of the appellant to a preliminary injunction depends upon two propositions, and the first is: Does the charter of the appellee authorize it to construct its channel along the route proposed, and thereby to pass through and over the appellant's land, and condemn so much of it as may be necessary for the purposes of the said channel? The appellee obtained its charter under article 721, Rev. St. Tex. 1895, and article 722 of the same, as amended March 1, 1897 (1 Sayles' Ann. St. 1897, p. 289 et seq.), as follows:

"Chapter 14.

"Channel and Dock Corporations.

"Art. 721. This title shall embrace and include the creation of private corporations for the purpose of constructing, owning, and operating deep-water channels from the waters of the Gulf of Mexico along and across any of the bays on the coast of this state to the mainland for the purpose of navigation and transportation, and for the construction, owning and operating docks on the coast of this state for the protection and accommodation of ships, boats and all kinds of vessels for navigation; and their cargoes. Acts 1887, p. 91.

"Art. 722 (644b) Channel Corporations; Added Powers. Every such channel corporation shall, in addition to the powers herein conferred, have power:

"(1) To cause such examination and survey for its proposed channel to be made as may be necessary to the selection of the most advantageous route for such purpose by its officers, agents or servants to enter upon any of the waters of such bays and upon any of the lands of this state, or of any person.

"(2) To take and hold such voluntary grant of real estate and other property as shall be made to it to aid in the construction and maintenance of its deep water channel and works pertinent thereto.

"(3) To construct its channel across, along, through, or upon, any of the waters of the bays within the jurisdiction of this state, and so far into the mainland as may be necessary to reach a place for its docks that will afford security from cyclones, storms, swells and tidal waves with such depth as may suit its convenience and the wants of navigation not less than five feet, and a width of not less than forty feet.

"(4) To furnish to vessels and boats adapted to the purpose facilities for navigating in and along the entire length of its channel, and to charge and collect a toll therefor, to be prescribed and established by its by-laws, not to exceed one per cent. per barrel bulk of the capacity of each vessel for each mile of the length of its channel used by the vessel going either way.

"(5) To borrow such sums of money as may be necessary for constructing, finishing, or operating its channel, and to issue and dispose of its bonds for any amount so borrowed and to mortgage its corporate property and franchises to secure the payment of any debt contracted for the purpose aforesaid: provided, the damages for any property appropriated by such corporation shall be assessed and paid for as is provided for in the case of railroads.

"(6) To enter upon and condemn and appropriate any lands of any persons or corporation that may be necessary for the uses and purposes of such

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channel corporation, the damages for any property thus appropriated to be assessed and paid for in the same manner as provided by law in the case of railroads: provided that no damages shall be assessed against or paid by it for any portion of the route of the channel embraced within and covered by the waters of any bay or lake on the coast of this state, nor for any portion of any island belonging to the state that may be requisite and necessary to the construction and successful operation of its channel: and provided, further, that its right of way shall not be less than the actual width of its channel, nor more than seven hundred feet in width on each side of its channel: provided, that when the land sought to be condemned under this chapter is arable land, such right of way shall not extend further than six hundred feet on each side of the channel from the edge or boundary of said channel."

An inspection of these statutes, particularly in connection with the following sections of the same chapter in relation to dock and channel corporations, shows that the right to expropriate the appellant's land for the purposes of channel cannot be questioned, if the route of the channel is laid out within the law, and in accordance with its charter. The charter of the company purports to authorize it to construct, own, and operate a deep-water channel from the waters of the Gulf of Mexico at Sabine Pass, along and across Sabine Lake, on the coast of Texas, to a point on the mainland at or near the town of Port Arthur, in the county of Jefferson, in the state of Texas, and to control, own, and operate docks along the coast of the state of Texas, at or near said channel, for the protection and accommodation of ships, boats, and all kinds of vessels for navigation and their cargoes, with full authority to exercise all of the powers and enjoy all the rights and privileges prescribed by chapter 14 of title 21 of the Revised Statutes of Texas of 1895, and all acts amendatory thereof and supplemental thereto. The charter follows the language of the Revised Statutes of 1895, except that in the Revised Statutes power is given to construct channels from the waters of the Gulf of Mexico along and across any of the bays on the coast of this state, and the charter authorizes the construction to begin at the waters of the Gulf of Mexico at Sabine Pass, and to run along and across Sabine Lake to a point in the mainland at or near the town of Port Arthur. The channel actually laid out by the company, and the location given it, begins at Sabine Pass, several miles above the Gulf, and without touching the waters of Sabine Lake, and going along and across that lake to the mainland near Port Arthur, goes directly into the mainland within 200 feet of its beginning point, several miles from the town of Port Arthur, and runs the rest of its route through the mainland, bordering on and along Sabine Lake till it reaches Port Arthur. The land bordering upon Sabine Lake, and particularly the land of the appellant through which the channel is to be constructed, is open, unimproved, low, flat, salt marsh, unfit for cultivation of any kind, and practically in high water the borders of the lake are not well defined. Assuming that the beginning of the proposed channel in the waters of Sabine Pass is equivalent to beginning at the Gulf of Mexico, the proper location of the channel therefrom seems to depend upon the force and effect of the words "along and across" in article 721, and "across, along, through, or upon" in paragraph 3, § 722. "Across"

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the waters of any bay would seem to warrant the locating of a channel in and through any bay in any direction. "Across, through, or upon" the waters of any bay certainly warrants a channel in any direction. "Along the waters of any bay" does not necessarily mean over, in, or through the waters, and may well mean along the borders of any bay; and in the statutes under consideration it seems to mean that or nothing. Considering the object of the statutes and the purposes of the appellee company, the narrow construction contended for is not admissible.

Concluding, as we do, that the charter of the appellee company authorizes it to construct its channel along the route proposed, and thereby to pass through and over appellant's land, and by proper proceedings expropriate the said land, the next proposition is: Under the peculiar circumstances of this case, is the appellant entitled to an injunction pendente lite to restrain the appellee company from entering upon the said land for the purpose of digging its channel until the final determination of the expropriation suit, and the payment of the damages awarded? Section 17 of article 1 of the Texas constitution reads as follows:

"No person's property shall be taken, damaged, destroyed or applied to public use without adequate compensation being made, unless by the consent of such person; and when taken, except for the use of the state, such compensation shall be first made, or secured by a deposit of money, and no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof."

The articles of the Revised Statutes of 1895 of Texas bearing on the question read as follows:

"Art. 4463.—When the said commissioners shall have assessed the damages they shall reduce their decision to writing, stating therein the amount of damages due the owner of such real estate, if any be found to be due, and shall date the same and sign it, and shall file the said assessment, together with all other papers connected with the case, with the county judge without delay."

"Art. 4468.—If either party be dissatisfied with the decision of such commissioners he may, within ten days after the same has been filed with the county judge, file his opposition thereto in writing, setting forth the particular cause or causes of his objection, and thereupon the adverse party shall be cited, and said cause shall be tried and determined as in other civil causes in said court.

Art. 4469.—If no objections are filed to such decision within the time prescribed in the preceding article, the county judge shall cause the said decision to be recorded in the minutes of said court, and may issue the necessary process to enforce the same."

"Art. 4471.—In no case shall such corporation be entitled to enter upon and take the property condemned without first having paid whatever amount of damages and costs may have been awarded or adjudged against it."

Construing these statutes, the Texas supreme court, in Gulf, C. & S. F. Ry. Co. v. Ft. Worth & R. G. Ry. Co., 86 Tex. 537, 546, 26 S. W. 54, 60, said:

"Under the law the award could not be made the judgment of the court until after the expiration of ten days from the time it was returned into court, and during that time plaintiff, by filing his objections to it, would have been entitled to a trial de novo before a jury, by which objections it would have set aside the award, and thus have secured ample protection before the

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county court, with the right of appeal to the court of civil appeals if its rights were not fully protected by the judgment of the county court."

In Travis Co. v. Trogdon, 88 Tex. 302, 31 S. W. 358, the court held, in effect, that where the condemnation was for the use of the state the statute might provide for entry upon payment of the assessment made by the commissioners, thereby inferentially holding the converse to be true, i. e. if the condemnation is for the benefit of private corporations, and not of the state, payment of the amount awarded will not authorize the condemning party to occupy and use the land.

In Ditch Co. v. Hudson, 85 Tex. 587, 22 S. W. 398, the commissioners had reported, and the amount of their award had been paid into court by the condemning party, at the time the owner applied for injunction to prevent entry upon his land, and the court held that an injunction to prevent entry upon the land should be granted, to continue till the condemnation proceedings were finally determined.

These decisions of the highest court of the state of Texas on the construction of the constitution and expropriation statutes of the state show that the appellee company had no right to enter upon the lands of the appellant for the purpose of digging its canal until compensation had been made, or the damages had been judicially assessed, and the amount thereof deposited; and that the deposit made by the appellee company in the county court of Jefferson county upon the award made in that court, and afterwards vacated, is without value; and it may be conceded that such will be the decree in the instant case on final hearing. This, however, does not meet the question in hand. The present application is for an injunction pendente lite to restrain the appellee company from committing trespass, and to compel the appellee to desist from further trespassing, and to abandon the digging of its channel pending and until the final determination of the litigation. Such injunctions are issued in the circuit court in the sound discretion of the chancellor, to prevent irreparable injury pending the final determination of the rights of the parties. It is only recently such discretion could be reviewed on appeal, and the effect of the appeal is merely to substitute the judgment and discretion of the appellate court for the judgment and discretion of the circuit court.

The circumstances of this case are peculiar. The case does not show a simple case of contest as to the value of certain lands to be expropriated for a canal; it rather shows an attempt, of course within the party's right, to defeat entirely the construction of the canal; and the grounds of attack cover many matters which, if well taken, would be fatal to the projected improvement without in the slightest degree benefiting the appellant. The appellant only owns an undivided one-eighth interest in the lands sought to be expropriated, and, although it is shown to be low, flat, salt marsh, unfit for human habitation, and unfit for farming or cultivation of any kind, he claims for it a value of $200 per acre on the water front and $100 per acre back from the water, while his co-owners of the other seven-eighths of the same land have acquiesced in the condemnation at the comparatively insignificant figure of less than $6 per acre. Considering the character of the land, it is by no means certain that any kind of

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canal digging done upon it pending the litigation would do any substantial injury, even if thereafter the canal should be abandoned. A jury of the freeholders in Jefferson county awarded the sum of $281.80 as the actual damages to the appellant for the expropriation sought, and that amount of money has been deposited to the credit of the appellant. The circuit judge required the appellant to file a bond in the sum of $5,000, conditioned to pay all damages which may be finally adjudged against the Port Arthur Channel & Dock Company in the condemnation proceedings. Without expressing any opinion as to the real value of the land in question, we are of opinion that the deposit already made and the bond required by the circuit court fully protect the appellant from all damages he may possibly incur pending the litigation, and that no injunction pending the said litigation is necessary to prevent irreparable injury.

The other questions raised by the assignments of error need not be passed upon at this time. The order of the circuit court appealed from is affirmed.

(87 Fed. 518.)

GLOVER et al. v. EQUITABLE MORTG. CO. OF KANSAS CITY et al.

(Circuit Court of Appeals, Fifth Circuit. May 17, 1898.)

No. 669.

1 CONTRACTS—WHAT LAW GOVERNS.

Complainants, husband and wife, consulted their attorney at Memphis, Tenn., about securing a loan on Mississippi real estate. He advised them to visit the office of a loan company at Vicksburg, Miss., with him, which the husband did. A bargain was struck, and papers drawn, which were sent to Memphis for the wife's signature. The notes were payable in New York, and the money was sent from Vicksburg to Memphis to complainants. The attorney received a commission on loans from the company. *Held*, that the contract was a Mississippi contract, to be construed by the laws of Mississippi.

2. USURY—SOLICITOR'S FEES ON MORTGAGES.

Provision in a deed of trust for the payment of solicitor's fees on default in no way affects the rate of interest thereon.

3. SAME—PROVISION AGAINST TAXATION.

Provisions in a trust deed giving the mortgagee the right to declare the principal due in case of taxation by the state of the deed or debt is not a means of evading the usury law.

Appeal from the Circuit Court of the United States for the Northern District of Mississippi.

The facts are practically conceded to be as found by the trial judge, as follows:

"This suit was originally brought in the chancery court of De Soto county, Mississippi, and removed into this court on the petition of the defendants. The bill of complainants alleges that the contract was executed in the state of Tennessee, and usurious, and to be performed in New York; and, if a New York contract, usurious, and usurious if construed under the laws of the state of Mississippi. * * * The facts in this case are substantially stated as follows: C. C. Glover and wife needed money, and applied to Caldwell & Co., of Memphis, Tennessee, for it, or contemplated doing so. C. C. Glover went to the law office of Mr. A. S. Buchanan, in the city of Memphis, Tennessee, to get him to prepare an abstract of title, and desired to borrow as much

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as twenty thousand dollars on his and his wife's plantation in De Soto county, Mississippi. Mr. Buchanan suggested to Mr. Glover that he would like to negotiate the loan through the Equitable Mortgage Company for him (Buchanan having no authority for making any loan for said company, or concluding any negotiation at any time in the state of Tennessee, or in the state of New York, or in the state of Mississippi. The extent of his authority was to solicit loans for the Equitable Mortgage Company, for which the company paid him a commission if they approved the loans); that it would be to his (Buchanan's) interest. C. C. Glover thereupon agreed to make application through Mr. Buchanan to the Equitable Mortgage Company at Vicksburg, Mississippi, and expressed himself as being in a hurry to get the money as soon as possible. Mr. Buchanan assured Glover that the Equitable Mortgage Company were very prompt in the transaction of business, and that it would greatly facilitate matters if, instead of correspondence with the company at Vicksburg, Mississippi, he would accompany him to Vicksburg, and there have a personal conference with the officers or agents of the company, at their office, and discuss with them all the business details, and all the questions arising about the title and the sufficiency of the security. Mr. Buchanan represented to Glover that the trip could be made to effect the purpose of practically closing the loan, and it was for this reason the trip was made to Vicksburg by Mr. Buchanan and Mr. Glover. They left Memphis on Sunday, the 6th day of January, 1889, and arrived at Vicksburg, Mississippi, on the afternoon of the same day. On the following day, Monday, January 7, 1889, they went to the office of the Equitable Mortgage Company in the city of Vicksburg, and submitted to the representatives of said company an abstract of title to the lands situated in De Soto county, state of Mississippi, belonging to Mr. and Mrs. Glover, together with certain affidavits to prove the abstract of title. All of said papers were also submitted to Miller, Smith, and Hirsch, attorneys of said mortgage company. Glover then and there appointed Buchanan his agent, and an application for a loan of twenty thousand dollars was then and there made to the Equitable Mortgage Company by Glover. The mortgage or deed of trust and the notes were all written and prepared then and there, and for the accommodation of Mrs. Glover, though dated and written at Vicksburg, in the state of Mississippi, the deed of trust and notes were sent to Memphis, in the state of Tennessee, and there signed and executed by the complainants to prevent Mrs. Glover from making a trip to Vicksburg, and not for the benefit of the Equitable Mortgage Company. Mrs. Glover knew of her husband's trip to Vicksburg with Mr. Buchanan, and that it was to borrow money. The Equitable Mortgage Company had no office or place of business in the state of Tennessee, and did no business in that state, but had an office and place of business in the state of Mississippi, and did business in said state from 1887 until they failed, in September, or thereabouts, 1893. The notes, as before stated, were written and dated in Vicksburg, Miss., and made payable at the office of said Equitable Mortgage Company in the city of New York, state of New York, and signed by Mr. and Mrs. Glover in the city of Memphis, Tennessee. When this was done, the mortgage was to be delivered to the clerk of the chancery court of De Soto county, at Hernando, then placed upon the records of said court, and delivered to said company at Vicksburg, and when this was done twenty thousand dollars was forwarded to the complainants from Vicksburg, Miss., to Memphis, in the state of Tennessee, and they received that amount."

H. D. Minor and J. W. Buchanan, for appellants.
J. Hirsh, Murray F. Smith, and T. M. Miller, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PARDEE, Circuit Judge, after stating the facts, delivered the opinion of the court.

The circuit court found that the loan in question "was made in the city of Vicksburg, and therefore a Mississippi contract, and not

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intended as a mere cover for usury, and must be construed under the laws of Mississippi, and is, therefore, not usurious"; and thereupon entered a decree dismissing the complainants' bill. In this finding we concur. The loan company was located in Mississippi, and the property mortgaged was in the same state. The agreement to make the loan on the security offered—the meeting of minds—was in the state of Mississippi, and it is clear from the evidence that the parties intended that it should be a Mississippi contract. Mr. A. S. Buchanan was a mere solicitor, and, while paid by the loan company, appears to have acted in the interest of and for both parties. He certainly was no such agent of the loan company as was authorized to agree to any of the terms of the contract. The fact that the note and deed of trust dated at Vicksburg, Miss., were executed in Memphis, Tenn., is a circumstance fully explained by the evidence. The loan is not usurious under the laws of Mississippi, because the rate of interest agreed upon was permitted by the laws of that state. The provision in the deed of trust as to the payment of solicitor's fees on default relates to a contingency which in no way affects the rate of interest. Spain v. Hamilton's Adm'r, 1 Wall. 624, 626; Meacham v. Pinson, 60 Miss. 217, 226. The provision with reference to the right of the loan company to declare the unpaid principal due in case of taxation by the state of the deed of trust or debt is also based on a contingency, and, as we construe the contract, it warranted, in no event, any higher rate of interest than the 10 per cent. stipulated. See Spain v. Hamilton's Adm'r, supra; Dugan v. Lewis (Tex. Sup.) 14 S. W. 1024; Williams' Heirs v. Douglass (La.) 17 South. 805; Gillmour v. Ford (Tex. Sup.) 19 S. W. 442. The decree of the circuit court is affirmed.

(87 Fed. 536.)

ROBERTSON v. SEWELL.

SEWELL v. ROBERTSON et al.

(Circuit Court of Appeals, Fifth Circuit. March 15, 1898.)

No. 626.

1. TAXATION—SPANISH GRANTS.
   Until a Spanish grant has been segregated from the public domain by survey properly approved, it is not subject to taxation by state authority, and a sale thereof for such taxes is void.[1]

2. PUBLIC LANDS—SPANISH GRANTS.
   The survey of a Spanish grant, as recorded in 1851, contained 18,121.22 acres, and was approved by the surveyor general in 1871. In the chancery book was found what purported to be a decree entered in 1851, confirming the surveyor's report to the extent of 16,000 acres. The decree was not signed by the judge, nor was it his practice to sign decrees, but the decree purported to be entered three days before the answer praying it was filed. *Held*, that the decree was not final so as to bar a further survey and confirmation.

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[1] As to lands of the United States not subject to state taxation, see note to Railroad Co. v. Wright, 4 C. C. A. 196.

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In Error to the Circuit Court of the United States for the Southern District of Florida.

This is an action of ejectment brought by Anna Bell Robertson and others, in the United States circuit court for the Southern district of Florida, involving the title to a tract of land described in the declaration. The court below filed the following findings and opinion:

"This cause coming on for a trial before the court, the parties having waived a jury by stipulation duly filed herein, and the same having been fully heard by documentary and written evidence and the oral testimony of witnesses and by argument, and having been fully considered, the court finds as matters of fact:

"First. That a grant of land five miles square on Indian river, at the mouth of San Lucie river, was made by the representatives of the Spanish government to one Samuel Miles, July 19, 1813; that May 17, 1815, said grant was surveyed in a square form by one McHardy; that said grant and survey were confirmed in 1840 by the superior court of the United States for the district of East Florida to certain grantees of said Miles; that upon appeal to the supreme court of the United States said confirmation was set aside as to the survey, but confirmed as to the validity of the grant, and a mandate issued directing that a new survey be made of the places and for a number of acres designated by said grant, of a form in accordance with the views expressed in the opinion in said case, namely, that the width on the river was not to exceed one-third of the length of the said survey back from said river [U. S. v. Hanson, 16 Pet. 196]; that in November, 1844, a new survey was ordered, which was made by the surveyor general through his deputy, Houston, and returned June 14, 1845; that such survey was also in a square form, and not in accordance with the mandate of the supreme court, and was rejected by the presiding judge of said superior court; that another survey was ordered to be made in accordance with the principles stated by the supreme court and its mandate; that on the 26th day of April, 1850, John M. Hanson et al. filed in said superior court a petition praying that said petitioners might be permitted to locate the number of acres contained in said grant in parcels in any land office in the state of Florida; that on the 18th day of April, 1851, the United States attorney for said district filed his answer to such petition, representing that a new survey had been made, and that petitioners should be limited to such location; that there was filed by A. M. Randolph, a deputy surveyor, in 1851, a plat and description of the claim of John M. Hanson and others as the claim designated in the 'register of mill grants in the name of Samuel Miles'; that such survey contained 18,121.22 acres, and was not approved by the surveyor general until November 25, 1871; that there was found recorded in the chancery book of the United States district court for the Northern district of Florida, under date of April 15, 1851, what purports to be a decree of confirmation of the said survey made by A. M. Randolph to the extent of sixteen thousand acres, and orders that the said lands thus located, surveyed, and described be decreed to be fully and finally confirmed to said claimants; that such decree was not signed by the presiding judge, and purported to be entered three days before the answer of the United States attorney praying the decree was filed; that it was not the practice at that time for the judge to sign decrees; that subsequently, April 14, 1880, upon the petition of one Jonathan C. Greely, assignee in bankruptcy of said John M. Hanson, alleging that no survey had ever been made as required and directed by the supreme court of said grant, an order was made that the surveyor general of the state of Florida do survey said Spanish grant to Samuel Miles in accordance with the mandate and opinion of the supreme court, and file a plat and map of said survey in said cause; that such survey was made in accordance with such order, and a survey and plat was filed in this court in this cause containing 16,006.38 acres, and that said survey and plat was in all respects approved and confirmed upon the application of Rufus K. Sewell et al.; that application was duly made to the general land office of the United States, and a patent issued from said office giving

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and granting unto John M. Hanson, John J. Hedrick, Bernardo Segui, and Dionisia Segui, and their heirs and assigns, the land described in said foregoing survey, provided that such patent should not interfere with any valid adverse right to the same, or be construed to preclude a legal investigation by a proper judicial tribunal: that said John M. Hanson, John J. Hedrick, Bernardo Segui, and Dionisia Segui were the original grantees of said Samuel Miles; that said patent was issued the 4th day of September, 1889; that December 1, 1890, Sarah Van Wagenen and others, among whom were all of the plaintiffs in the present suit, filed their petition alleging the previous survey by A. M. Randolph, and the alleged decree confirming said plat and survey, and praying that all subsequent action by Jonathan C. Greely, as assignee in bankruptcy of John M. Hanson, and others, and the survey and plat made under the order of April 14, 1885, and the decree of confirmation thereof, be vacated and set aside as null and void on account of the court's having no jurisdiction, it having exhausted its jurisdiction by its said previous action, and for other relief, to which a demurrer was filed, which, upon being fully heard, was sustained, and, no application to amend being made, said petition was dismissed.

"And the court further finds, as a matter of fact, that subsequent to the survey of said grant of 1851, certain lands calimed [claimed] to have been surveyed as such grant in the survey of Randolph, to the extent of 17,970.97 acres, were entered upon the tax books of the state of Florida for the county of Dade, and assessed as of unknown ownership, for the years 1877, 1878, and 1879, and were put at auction for sale for such taxes on the 6th day of September, 1880, and, there being no bidder, were reported as sold to the state of Florida for the sum of $292.65; and on the 1st day of May, 1882, W. D. Barnes, comptroller of said state, did transfer and assign such certificate to Sarah A. Falligant, Sarah A. Van Wagenen, Mary R. Gilbert, Fannie E. Lanier, Anna Bell S. Robertson, and Electra C. Falligant, plaintiffs herein, and upon the presentation of said certificate to the clerk of the said county of Dade he made a deed of said 17,970.97 acres to said Sarah A. Falligant and others as aforesaid.

"And the court further finds, as a matter of law, that the action of the court in ordering and approving the survey of Hopkins, as is shown in evidence, and in the matter of the petition of the plaintiff herein in the case of Van Wagenen et al. against Sewell, is binding upon this court, and that all such rights of the plaintiffs herein as against the defendant, as relates to and depends upon the said survey of Randolph in 1851, and the confirmation thereof, and the said survey of Hopkins, and approval and confirmation thereof, of 1889, have been heretofore determined and settled, and such questions are res judicata by the action of the court in the said case of Van Wagenen against Sewell.

"And the court further finds, as a matter of fact, that the defendants, claiming for Rufus K. Sewell, went onto and took possession of the eastern one-third part of said grant in November, 1889, and has held possession of the same as his one-third interest in said grant ever since, and paid taxes on the same, and has ousted plaintiffs from any interest in said one-third of said grant.

"And the court further finds, as a matter of law and fact, that the grant to Samuel Miles was never legally segregated from the public domain at the time when the taxes were assessed on the grant, and prior to the time it was sold, as cited in the tax deed put in evidence by the plaintiffs, and said alleged sale and said tax deed were null and void.

"And the court further finds that the plaintiffs herein are by proper and legal conveyance jointly entitled to a fee-simple title in and to the possession of one undivided third part and interest in the entire tract, lot, or parcel of land situated in the county of Dade, state of Florida, and known and described as follows, to wit: [Then follow same description of land as described in the declaration]; and that for this one-third undivided part of such lot or parcel of land, together with their costs herein, they are entitled to judgment."

Opinion.

"The plaintiffs in this case claim title and possession of the property in dispute from two sources: First, the plaintiffs claim to be the heirs of the

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grantee of one-third of the entire grant; second, they claim under a tax deed from the state of Florida for the nonpayment of unpaid taxes.

"The case was tried by the court upon stipulation of parties, in one of which was stipulated that Miles, the original grantee, conveyed one undivided third interest through John J. Hedrick; in another it is stipulated that Hedrick's interest purports to have been conveyed to John G. Falligant, and the plaintiffs are his heirs and devisees. It was further stipulated that, in 1890, Rufus K. Sewell claims to have gone upon the east one-third of the land, and claimed it as his third, and has claimed to pay taxes on that portion since 1891 or 1892. The title of Rufus K. Sewell is shown by a regular deed of conveyance from John M. Hanson, and a deed of conveyance from said Rufus K. Sewell to the defendant Henry E. Sewell.

"First the defendant pleaded the general issue of not guilty, but on the 27th day of January, after the case was called for trial, the defendant filed an additional plea, viz. that the defendant had never denied the right of the plaintiffs to the undivided one-third interest of the grant.

"The court has found that the tax title under which the plaintiffs claim is void, but that they are entitled jointly to an undivided one-third interest in fee simple of the entire grant, and that they had been so ousted from the possession of the eastern one-third of the grant as to entitle them to judgment upon this suit. Exceptions to such findings have been taken.

"It is contended by the defendant that the plaintiffs, having claimed the whole of the premises, are not entitled to judgment unless found to be entitled to the whole. The court does not consider the law to be so determined in this state. The common-law action of ejectment has been done away with, and the statute which has taken its place plainly provides that, in any suit for ejectment, the judgment shall determine and declare the interest that the plaintiff may have in the premises claimed. The court considers that wherever any interest is found in the plaintiff, not more than that claimed by him he is entitled to judgment for that amount, although it may be of less quantity than that sued for. This view is sustained by the text and a large number of authorities cited in Waite's Action and Defenses (volume 3, p. 123).

"It is also claimed by the defendant that there is no evidence which would justify the findings of fact that the plaintiffs were entitled to an undivided one-third interest in the land. The language of the stipulation that Hedrick's interest purports to have been conveyed to John G. Falligant can only be considered as equivalent to a declaration and stipulation that there is evidence which tends to show that Hedrick's interest has been conveyed to John G. Falligant, and this, taken in connection with the plea of the defendant that he had never denied that the complainants were entitled to a one undivided one-third interest in the property, the court considers may be deemed as an allegation and an admission of the title in the plaintiffs to that amount. Any other construction would appear to be simply holding out an inducement to plaintiffs to waive introducing testimony upon that point, and then taking advantage of such omission.

"The only other ground of exception is to the finding of fact that the defendant did oust plaintiffs from any possession which would justify this suit.

"The sixteenth stipulation is that Rufus K. Sewell claims to have gone upon the eastern one-third of the land and claimed it as his one-third. The defendant, Henry E. Sewell, testifies that he, in 1889, went onto this, and claimed for his father a part of this land, and his improvements were upon the northeastern portion. There can be but one conclusion drawn from this stipulation and testimony, taken together, and that is that the defendant herein claimed that which is stipulated his father claimed, and since that time been holding the land with the same understanding that it is stipulated that Rufus K. Sewell claimed; that is, he claimed the eastern one-third of the land as his third. This is considered a reasonable and necessary conclusion that the land was held, claimed, and possessed as an entire interest of that eastern one-third instead of the one undivided third of the entire lot which it is admitted he was entitled to; and such possession of the one-third it is considered fully justifies the finding that the plaintiffs had ousted the defendant from any interest in that eastern one-third.

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"It is also contended by the defendant that he having admitted by his plea that the plaintiffs were entitled to one undivided third interest, and the court not having found them entitled to any greater interest than it is so admitted, the costs should not have been adjudged against him herein. Had such plea of admission of the right of the plaintiffs been filed at an earlier stage of the case, it might have been considered more favorably; but until the case was called for trial the defendant had stood upon his plea of not guilty, which, under the statute, is held to admit both his possession and adverse claim. It is true that a party can, by admission of the rights of the plaintiff at any time in the suit, prevent a judgment for subsequent costs, but at no time will such action be held to affect the costs which had already been incurred up to that time. In this case the late filing of such plea cannot be considered as depriving the plaintiffs of their right of costs up to that time, as certainly no opportunity was given for them to dismiss their suit or obtain their rights in any other manner previous to that time.

"It is ordered, therefore, that the judgment be so far amended as to make the defendant liable to the cost of suit up to the time of the filing of that plea; and the motion for arrest of judgment and a new trial is denied."

H. H. Buckman, for Anna Bell Robertson and others.

H. Bisbee and C. D. Rinehart, for Henry E. Sewell.

Before PARDEE and McCORMICK, Circuit Judges.

PER CURIAM. As the parties waived trial by jury in the circuit court and submitted the case to the judge, we are concluded by the findings of fact. The vital question in the case is whether the lands in controversy had been so segregated from the public domain by the alleged decree in 1851 as to permit of their assessment and taxation by the state of Florida in the years 1877, 1878, and 1879. From the findings of fact relating to the decree of 1851, we are of opinion that the said decree did not become final and executory. This we understand to be the ruling of the circuit court, and we affirm the same. Affirmed.

(87 Fed. 574.)

THE ILLINOIS.

BALANO et al. v. THE ILLINOIS.

(Circuit Court of Appeals, Third Circuit. April 27, 1898.)

No. 10.

1. COLLISION—TUG WITH TOW—STARTING FROM DOCK.

A tug starting out into the Delaware river, from behind piers which obstruct her view, with a tow on a hawser, must exercise caution, but is not bound absolutely to ascertain beforehand whether any vessel is approaching; and where she gives the proper signal to enable a vessel actually approaching to avoid the tow by proper and reasonable navigation, she is not to be held liable for a collision between them.

2. SAME—STEAMSHIP IN CHANNEL.

Where a schooner towed by a tug on a hawser was struck in the Delaware river, by a passing steamship, shortly after the tug and steamer had emerged from behind piers that obstructed their view, *held*, that the steamship was solely at fault, in that, while proceeding in a narrow channel, where vessels and tows were likely to be encountered, she failed to perform her duty of running slowly, keeping a careful lookout, and listening attentively for signals.

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Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This was a libel in rem by James W. Balano, master of the schooner Mabel Jordan, against the steamship Illinois, whereof the International Navigation Company was owner, to recover damages caused by a collision. The tug Gladisfen was subsequently made a co-defendant, on the petition of the claimant of the Illinois. The district court, after a final hearing on the merits, found the Illinois solely in fault, and decreed accordingly. 65 Fed. 123; 84 Fed. 697. The claimant thereupon appealed to this court.

N. Dubois Miller, for appellant.

John F. Lewis, for the Mabel Jordan.

Henry R. Edmunds, for the Gladisfen.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

DALLAS, Circuit Judge. The schooner Mabel Jordan was run into and sunk by the steamer Illinois on June 9, 1893; and, upon the latter being libeled for the loss, her owners filed a petition under which the Gladisfen, a steam tug which at the time was engaged in towing the schooner, was made co-respondent. Unquestionably, the collision was occasioned by negligence either of the steamer, or of the tug, or of both. The court below held that it resulted wholly from fault of the former; and it is now insisted that this conclusion was erroneous, because, as is alleged in the petition of the Illinois—

"Those in charge of said steam tug Gladisfen were in fault as follows: (1) In towing said schooner out into the channel, from behind the covered piers, without giving proper and lawful signals to approaching vessels. (2) In towing the schooner into the channel, from behind the covered piers, without ascertaining whether any vessels were approaching. (3) In not keeping a vigilant outlook, and failing to observe the steamship Illinois in time to avoid the collision. (4) In towing the schooner Mabel Jordan into the channel with a hawser of excessive length. (5) In cutting the hawser by which the schooner was being towed. (6) By conducting and managing said towage service so negligently, carelessly, and unskillfully that the collision occurred."

In so far as it is possible to regard these allegations as being well founded in law, they were not only unsupported by proof, but the weight of the evidence was clearly against them.

1. The fact that the tug, in towing the schooner out into the channel, gave the "proper and lawful signals," was established by abundant testimony. When starting from the dock, and before emerging from behind the piers, she whistled, as is customary, to give notice of her approach to all vessels which might be moving either up or down that part of the river; and when she passed outside of the dock, and sighted the Illinois, she immediately signaled that vessel to pursue a course which, if followed, would have averted the disaster.

2. It was the duty of the Gladisfen to be cautious in moving out from behind the piers, but she was not required to absolutely ascertain whether any vessels were approaching. She was bound to be careful, but not to insure safety. Therefore the second of the alle-

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gations of the petition sets up a false standard of liability; and, because it charges no specific wrongful act or omission, it presents no distinctive question of fact for consideration.

3. We are fully convinced that a proper lookout was maintained at the bow of the Gladisfen, and that the Illinois was observed promptly and without delinquency.

4. The proofs conclusively establish that the towing hawser was not of excessive length.

5. The cutting of the hawser did not in the slightest degree contribute to cause the collision. It was entirely proper to cut it at the time it was cut, with the object which induced the cutting.

6. The last allegation asserts, in general terms, that the tug was in fault in its conduct and management of the towage; and with reference to this broad averment, but without needless prolixity, the case will be further considered. The schooner which was sunk was laden with coal, and was lying in the dock at Greenwich Piers, on the west side of the Delaware river. Her intended course was down the river. She was in tow of the Gladisfen, which, in starting to draw her from the dock, gave the customary signal,—a long blast of the whistle. The view from vessels within the dock, and of such vessels from the river, was much obscured by the adjacent covered piers. When the bow of the Gladisfen came beyond the outer line of these piers, the Illinois was seen to be coming down the channel, and the Gladisfen signaled to her to pass to the westward of the tow. The tide was running up, and when the schooner came out into the river she was carried upward, and to the eastward. The tug was headed down the river, and the schooner, being then subject to the influence of the slack hawser, and also to the antagoistic force of the tide, was, practically speaking, not moving. It is contended on behalf of the Gladisfen that the schooner, before being struck, had passed over to the eastward side of the channel, while for the Illinois it is insisted that she was at its western edge. Our investigation of the evidence has convinced us that neither of these views is correct; but we are satisfied that the schooner must have reached a point sufficiently to the eastward of the western side of the channel to admit of the Illinois passing her as the Gladisfen's signal required her to do, and this, as it seems to us, is all that it is necessary to determine respecting the schooner's position. The pilot of the Illinois did not suppose that he could not pass with safety to the westward of the tow, for the evidence shows, and the part of the schooner which was struck plainly indicates, that this is precisely what was attempted; and that this attempt was not successful resulted, we think, wholly from the fault of the Illinois. Those on board of that vessel testified that they did not hear the signal of the Gladisfen, but there is no room to doubt that it was given. A steamboat which was alongside of the Illinois, and in a less advantageous situation for hearing, heard it, and, being of light draft, kept out of the way by going over the flats to the eastward. We can see no possibility of excuse for the conduct of the Illinois. She was proceeding in a channel which at this point is quite narrow, and where it was to be expected that vessels and

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tows might be encountered as in this instance. It was therefore her especial duty to run slowly, and to keep a careful lookout, and to attentively listen for signals; and the record shows that in all of these particulars she failed to exercise even ordinary care. On the other hand, the Gladisfen appears to have done everything which by law or custom she was called upon to do. In addition to the points already considered, counsel has suggested that she ought to have sent a man to the masthead of the Mabel Jordan, that she should have had a watch stationed at the outer end of one of the piers, and that she should have been prepared with means for "snubbing," and should have employed those means to check the progress of the tow from the dock. But none of these suggestions can be accepted. It was not incumbent upon either the tug or the schooner to station a lookout upon the mast of the latter, and we are unable to perceive that a lookout so placed would have been of any use. He might have seen the Illinois sooner than she was seen by the man upon the bow of the tug, but, if he had seen and reported her, still, under the circumstances, the tug would have been justified in proceeding into the river as she did. When she arrived there, the duty was cast upon her to signal the Illinois. This she did, and then the collision occurred, not because the tug had wrongfully issued from the dock, but because the Illinois was so negligently navigated as to render the tug's signal unavailing. A man at the end of the pier would have been in no better position for observing the approach of the Illinois than was the one upon the bow of the tug; but, aside from this, we do not think it was in this case the duty of the tug to set a watch upon the land. As to snubbing the vessel (that is to say, stopping her advance after she had started), what was said by the witness Capt. Hudson is manifestly true. Arrangements could have been made "to have somebody on the tug with some hawser to hold, but you never get a hawser to hold any vessel of any size and weight. It would tear out the chocks and part the line."

We do not deem it necessary to exhaustively review this voluminous record. To what has been said, it must suffice to add that a careful examination of it discloses no error in the judgment of the district court, and it is accordingly affirmed.

(87 Fed. 586.)

McGORRAY v. O'CONNOR et al.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1898.)

No. 407.

1. EQUITY—PLEADING—MOTIONS TO STRIKE.

A motion was made to strike out answers for want of certificates of counsel that the answer was well founded in law. The court denied the motion, "with leave to said defendants to further verify their answers, and add certificates, if so advised." *Held*, that this order was merely permissive, and not a decision, constituting the law of the case, that certificates to the answer were necessary.

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2. SAME—CERTIFICATES TO ANSWER.
There is no equity rule requiring a certificate of counsel that an answer to the merits is well founded in law.

3. SAME—MOTION TO STRIKE.
A motion to strike out parts of the answer must be denied when not sufficiently specific to identify the portions to be stricken.

4. EQUITY PRACTICE—SETTING DOWN FOR HEARING.
Where over 90 days elapse after the filing of the replication without the taking of any testimony by plaintiff or any motion to extend the time for taking testimony, and thereafter plaintiff gives notice of motions to strike out certain portions of the answer, which motions are denied, there is no error in then setting the case down for hearing on the bill and answers.

5. MORTGAGE FORECLOSURE — RIGHT OF REDEMPTION — HEIRS AND SURVIVING PARTNER.
In California, where the law gives to a surviving partner absolute power of the control and disposition of the assets of the partnership (Code Civ. Proc. § 1585), the heirs of a deceased partner have no such interest in the partnership property as entitles them or their judgment creditors to redeem such property from a sale under a mortgage. 79 Fed. 861, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of California.

Amos H. Carpenter, for appellant.

Olney & Olney and Dudley & Buck, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The appellant, Bernard McGorray, was the complainant in a bill in equity brought to redeem certain real property from a mortgage sale. C. W. Carpenter and C. K. Bailey were partners in farming and stock raising. They mortgaged a portion of their real estate to Myles P. O'Connor. Carpenter died, leaving a will, devising the greater portion of his property to his partner's children. The mortgage was subsequently foreclosed, and the mortgaged property was sold to the mortgagee. The complainant filed a bill in equity against O'Connor and others, claiming that the sheriff's deed which O'Connor had received was void, and praying that it be canceled, and that the complainant be allowed to redeem the premises described therein, basing his right to redeem upon the fact that he was the assignee of a judgment which had been obtained in an action at law against Clinton H. Carpenter, a brother of the said C. W. Carpenter, deceased, and one of his heirs at law. The defendant O'Connor filed a separate answer to the bill, and the other defendants united in a joint answer. Thereupon the complainant filed, on April 1, 1896, his replication to both answers. On June 29, 1896, the complainant gave notice to the defendants of a motion to strike out certain portions of the answers, on the ground that they were sham, redundant, and conclusions of law, and noticed the motion for July 6, 1896. Said motion was continued by the court to August 3, 1896. The complainant took no testimony on the issues; but on July 14th, and after the expiration of the 90 days allowed to take testimony, the defendants in the suit gave notice that they would set the cause down for trial. Three days later, the complainant served notice of a motion to strike the answers of the defendants

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off the files, on the ground that they were not accompanied by certificates of counsel, as required by rule 10 of the circuit court, certifying that, in the opinion of counsel, the answer "is well founded in point of law." On August 3, 1896, the motions came on to be heard. The motion to strike out the answers for want of the certificates was denied by the court, "with leave to said defendants to further verify their answers, and add certificates if so advised." The motion to set the cause for hearing upon the bill and answer was denied, and it was ordered that the motion to strike out parts of the answers and the motion for judgment on the pleadings be submitted upon briefs. Some months later the said order was revoked by the court. On March 27, 1897, the complainant filed and served a second notice of motion to strike the answers from the files, on the ground specified in the former motion, and because the defendants had failed to comply with the order of the court requiring them to attach said certificates. On March 31, 1897, that and the other motions pending were argued and submitted; whereupon the motion to strike out the answers for want of certificates and the motions to strike out portions of the answers were denied. Thereafter, on April 12, 1897, a final decree was entered, reciting that, the cause having been heard on the bill and the respective answers, it was decreed that the complainant was not entitled to any of the relief prayed for in his bill, and his bill was dismissed. 79 Fed. 861.

The appellant contends that upon the hearing before Judge Morrow, on March 31, 1897, the motion to strike the answers from the files for want of certificates was erroneously denied, since the law of the case was decided by Judge McKenna by his order of August 3, 1896, giving the defendants leave to attach the certificates, citing Wakelee v. Davis, 44 Fed. 532, and Warswick Mfg. Co. v. City of Philadelphia, 30 Fed. 625. To this it is sufficient to say that the order of court of August 3, 1896, did not require the defendants to attach such certificates. It was permissive in its terms, and left the defendants free to attach the certificates if they were advised that the same were necessary. The defendants evidently did not consider their answers open to objection upon that ground, and they very properly declined to avail themselves of the permission afforded them by the court. If the omission of such certificates had been ground for striking the answers from the files, the right to take advantage of such defect had clearly been waived by filing replications to the answers. But there was no necessity for such certificates. Rule No. 10 is a common-law rule, and has no application to suits in equity, and there is no equity rule requiring a certificate of counsel to an answer to the merits of the bill. Nor do we discover error in the ruling of the court upon the motions to strike out portions of the answers. As the record is presented in this court, it is impossible to identify any of the portions of the answers to which the motion was directed.

Counsel for appellant contend that the cause was wrongfully set for hearing upon the bill and answers before the pleadings were settled, and that they objected to said hearing for that reason, and upon the ground that they desired to take testimony as soon as the issues

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were complete. The record shows that more than 90 days had elapsed after the replications were filed before any motion against the answers was filed in court. The record shows no application to the court to extend the time for taking testimony, nor any affidavit stating grounds on which such extension could have been ordered. There was no error, therefore, in setting the case down for hearing upon the bill and answers on March 31, 1897.

We find no error in the decree dismissing the complainant's bill upon the hearing had upon the bill and the answers. One of the material allegations of the bill was the averment that the complainant was the assignee of the judgment which had been rendered against Clinton H. Carpenter. This was distinctly denied in O'Connor's answer. In a hearing upon the bill and answers under this condition of the pleadings, it would have been impossible for the court to have awarded relief against the principal defendant, the holder of the legal title to the property which was sought to be redeemed. But, aside from this, a further and complete answer to the asserted right of the complainant to the relief sought by his bill is found in the fact that the land which was mortgaged to O'Connor was the partnership property of the mortgagors. After the foreclosure of a mortgage on real estate and the sale of the mortgaged property, the right to redeem from the sale is purely statutory. Section 701 of the Code of Civil Procedure of California confers the right upon—First, the judgment debtor or his successor in interest in the whole or any part of the property; and, second, a creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The property belonged to the firm of Bailey & Carpenter. It may be assumed from the facts stated in the pleadings that the title was vested in the firm. Upon the death of Carpenter, the possession of the partnership property was vested in the surviving partner. He had the absolute right of possession, and the power to control the property until the affairs of the partnership were wound up. It is still in his hands as such surviving partner. No right of redemption has descended to the heirs of Carpenter. Allen v. Hill, 16 Cal. 113; Theller v. Such, 57 Cal. 447; Robertson v. Burrill, 110 Cal. 568, 42 Pac. 1086; Smith v. Walker, 38 Cal. 388. The appellant clearly comes within neither of the classes of persons who are given the statutory right to redeem the mortgaged property after a mortgage foreclosure and sale. His assignor is not the judgment debtor, nor is he his successor in interest, nor was he a creditor having a lien by judgment or otherwise on the property sold. The decree of the circuit court must be affirmed.

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(87 Fed. 590.)

GENERAL ELECTRIC CO. v. LA GRANDE EDISON ELECTRIC CO. et al.

(Circuit Court of Appeals, Ninth Circuit. May 10, 1898.)

No. 416.

MORTGAGES—FORECLOSURE—TRUSTEES—SECURED BONDHOLDERS.

A holder of bonds secured by a general mortgage to a trustee for the benefit of all the bondholders, although the right to sue belongs to him individually, may not bring a suit to foreclose the mortgage either for the interest or the principal due, without alleging that the trustee has been requested to bring the suit, and has refused, or without showing some other reason why the trustee may not represent him in the suit.

Appeal from the Circuit Court of the United States for the District of Oregon.

Frederick V. Holman, for appellant.

Dolph, Mallory & Simon, for appellee Security Savings & Trust Co.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The appellant was the complainant in a suit in which its bill was dismissed in the circuit court, upon the ground that, as holder of certain bonds, it had brought a suit for foreclosure, without alleging that it had requested the trustee to commence the suit, or alleging any reason for instituting the suit in its own name, save the fact that the mortgagor has failed to pay certain interest coupons, and the trustee has failed to bring suit or to foreclose the mortgage. The mortgage to the trustee provides that upon default by the mortgagor in payment of interest or taxes or any of the bonds as they should fall due, and the continuance of such default for the period of 30 days after notice by the trustee, the trustee might take possession of and operate the mortgaged property. The trustee was "also authorized, instead of so doing, and with or without taking of said plant, to treat the whole amount of the principal of said bonds, together with all accrued and unpaid interest, as immediately due and payable, and thereupon to proceed to sell and dispose of said property at public auction after due notice and advertisement, as provided therein, and, from the proceeds arising from such sale (after the payment of all taxes, expenses, and charges upon said property, and expenses of such sale, including compensation to said trustee, and reasonable allowance for attorney and counsel fees), to pay the said bonds and coupons." And it was further provided, as one of the conditions of said mortgage or deed of trust, that the foregoing provisions for the sale of said property by the said trustee, under the above-recited powers, should be cumulative upon the ordinary remedies of foreclosure by entry or suit therefor. The appeal challenges the ruling of the circuit court in dismissing the bill.

The rule that a holder of bonds which are secured by a general mortgage to a trustee, for the benefit of all the bondholders, may not

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bring a suit to foreclose the mortgage either for the interest or the principal due, without alleging that the trustee has been requested to bring the suit, and has refused, or without showing some other reason why the trustee may not represent him in the suit, has been, we believe, so generally acquiesced in that the courts have rarely been called upon either to apply the rule or to consider the reasons on which it is founded.

Said the court in American Tube & Iron Co. v. Kentucky Southern Oil & Gas Co., 51 Fed. 826:

"The preference in favor of a trustee in the absence of a contract giving a preference is because the trustee is presumed to represent all of the bondholders, and its convenience in practice; but, if the trustee has accepted a position antagonistic to his duty as such trustee, then he forfeits this preference as against a bondholder."

In section 6210 of Thompson on Corporations it is said:

"Ordinarily, such bondholders have no right to bring an action to foreclose the mortgage, but the trustee in the mortgage, as stated in the preceding section, is the proper person to sue. But if he neglects to sue, after the happening of the condition which entitles the bondholders to a foreclosure, and after being requested by them so to do, they may bring the action to foreclose, making him a party defendant,"—citing Owens v. Railroad Co., 20 Fed. 10; Beekman v. Railway Co., 35 Fed. 3.

The appellant earnestly contends that the rule so quoted is not sustained by the authorities. We have carefully considered all the cases to which our attention has been directed, and we will briefly review them.

Alexander v. Railroad, 3 Dill. 487, Fed. Cas. No. 166, was a case in which the bill to foreclose the mortgage contained the allegation that the bondholders, who were the complainants in the suit, brought the same for themselves and all other bondholders similarly situated. The bill alleged that they had requested the trustee of the mortgage to bring the suit, and that it had refused. It contained no allegation that the complainants were a majority of the bondholders, or that a majority had made the request to the trustee. On demurrer to the bill the court said:

"There is no restriction in the deed of trust before us, upon the right of the coupon holder to foreclose for interest upon default, although a majority of the bondholders do not unite in the suit, or request the trustee to bring it. The provision in question gives a majority of the bondholders, on default of the payment of interest, the option or election, after the expiration of a year from the default, to have the whole principal sum become due at once, and the mortgage security enforced accordingly. This is not inconsistent with the unabridged right of any coupon holder to foreclose for interest, in the manner sought in the present bill; and it was not necessary that a majority of the coupon holders should unite in bringing the bill, or in a request to the trustee to bring it. As the bill alleges that the trustee refused to bring suit, the bill was properly brought in the name of the plaintiffs, for themselves and the other coupon holders, making the trustee a defendant."

This authority surely does not sustain the appellant's contention. As we read it, it is clearly in harmony with the rule which we have quoted from Thompson on Corporations. In recognizing "the unabridged right of any coupon holder to foreclose for interest, in the manner sought in the present bill," the court undoubtedly had in

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view the right of such a complainant to foreclose only after a request to the trustee and the trustee's refusal, for such was the manner pursued in the "present bill."

The case of Howell v. Railway Co., 94 U. S. 463, is cited. That was a case in which the right of a bondholder to foreclose the mortgage for due and unpaid interest was recognized. No question was raised before the appellate court concerning the right of the bondholder to bring the suit. The record is silent concerning the reason why it was not brought by the trustee. It may fairly be presumed that the bill contained the averment that the trustee had, upon request, refused to bring the suit, or some other averment satisfactorily explaining to the court the reason why the suit was brought by the bondholder.

In the case of Railroad Co. v. Fosdick, 106 U. S. 47, 1 Sup. Ct. 10, the court said:

"We are of the opinion that, independently of the provisions of the other articles, the trustees, or, in their failure to do so, any bondholder, on nonpayment of any installment of interest on any bond, might file a bill for the enforcement of the security by the foreclosure of the mortgage and sale of the mortgaged property. This right belongs to each bondholder separately, and its exercise is not dependent upon the co-operation or consent of any others, or of the trustees. It is properly and strictly enforceable by and in the name of the latter, but, if necessary, may be prosecuted without, and even against, them."

We search this case in vain for any expression of the court which gives countenance to the appellant's contention. The language above quoted, that the "right belongs to each bondholder separately, and its exercise is not dependent upon the co-operation or consent of any others, or of the trustees," is not pertinent to the question now before us. No issue is raised in the present case to which that language is applicable. It may be admitted that the right of the bondholder to sue belongs to him individually, and, in its exercise, he is not required to obtain the co-operation or consent of other bondholders or of the trustee. All that he is required to do is to give the trustee the opportunity first to bring the suit, in the interest of all the beneficiaries, by requesting him to do so, or to show some reason why the trustee may not represent him in the proceedings.

In the case of Hammond v. Tarver (Tex. Sup.) 34 S. W. 729, a collateral attack was made upon the decree of a court foreclosing a trust deed, and confirming the sale of property thereunder, upon the ground that the trustee had not been made a party to the suit. The supreme court of Texas held that in that state the trustee in such a mortgage is not a necessary party to the foreclosure suit. It does not follow from that ruling, however, that a holder of bonds under such a trust deed could foreclose in the courts of Texas without averring in his complaint that the opportunity had first been afforded the trustee to bring the suit.

The case of Dupee v. Rose (Utah) 37 Pac. 567, is authority for the proposition that a power to sell, contained in a trust deed, does not divest a court of chancery of jurisdiction to enforce the rights of the parties thereto; that such power is merely cumulative to that granted by law. In that case the plaintiff was the sole beneficiary of the

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trust deed, and no question was raised of his right to prosecute the suit.

None of the other cases cited by counsel for the appellant are believed to be in point upon the question which the appeal presents. In the main, they support the proposition that a bondholder is not deprived of the usual remedies which a court of equity recognizes as his from the fact that the trust deed contains conditions and recitals prescribing the method in which foreclosure shall be had, and imposing conditions upon the exercise by the bondholders of the right to foreclose.

We find no error in the decree of the circuit court dismissing the bill, and it is accordingly affirmed.

(87 Fed. 594.)

LOUISIANA, A. & M. R. CO. v. BOARD OF LEVEE COM'RS OF TENSAS BASIN LEVEE DIST.

(Circuit Court of Appeals, Fifth Circuit. April 26, 1898.)

No. 650.

1. APPEAL AND ERROR—SUFFICIENCY OF ASSIGNMENTS OF ERROR.
   Assignments of error that in substance amount to only that the court erred in deciding the case for the opposite party are not specific enough to demand consideration.

2. LEVEES—POWERS AND DUTIES OF BOARDS.
   The act of July 3, 1886 (Sess. Laws, p. 96), of the Louisiana legislature, creating the Tensas Basin Levee Board, authorizing it to assess taxes, collect and receive funds, and hold and administer the same, and granting to it large tracts of public lands to be expended by it discreetly for the purpose of carrying out the purposes of the act, created not a merely ministerial and executory functionary, but a full-fledged municipal corporation, with large discretion as a fiduciary agent, and with full power to sue in regard to the trust imposed.

3. SAME—POWER OF BOARDS TO CONTRACT.
   The constitution of Louisiana (article 214) authorizes the legislature to create levee districts, the boards of which shall have supervision of the levees in said districts. Article 216 gives power with the concurrence of the adjacent state or states to create levee districts composed of territory partly in the state and partly in adjacent states. Act No. 59, 1886, § 17, provides that the Tensas Basin District, in Louisiana, shall have the right to join with any levee district embracing the counties of Chicot and Desha, in Arkansas, for mutual protection. *Held*, that a contract by the Tensas Basin District for the building of a levee in Chicot county, Ark., in opposition to the levee authorities of that state, was ultra vires and void.

4. SAME—CONTRACT BY RAILROAD FOR EMBANKMENT.
   Defendant, an Arkansas railroad company, contracted with plaintiff, a Louisiana levee district, to build a portion of its railroad in Arkansas in the form of a levee embankment, of a certain height, which should serve the purpose of a levee as well as a railroad bed. The statutes of Arkansas forbid the building of railroad embankments which will interfere with the natural flow of the water, and the levee authorities in the district where the road was proposed to be built opposed it by legislation. *Held* that, the contract being impossible of performance, it should be rescinded.

5. SAME—WHAT ARE PUBLIC IMPROVEMENTS.
   Acts La. 1888, No. 77, § 2, gave the Tensas Basin Levee District all the state lands within the district to be used for the purpose of building a system of levees or other public improvement for the purpose of protecting

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the district from disastrous floods, and authorized the board to dispose of the lands in such manner as it should deem proper. Const. La. art. 56, prohibits the granting of the property of the state to private enterprise. The board contracted with a railway company for the building of a portion of its road in the form of a levee embankment, which the state engineer reported would be of great value to the district. *Held*, that the railway was, to the extent it would protect the district, a "public improvement," contemplated by the statute, though owned at its completion by private persons, and used for another purpose besides being a mere levee.

6. CONTRACTS—TIME OF PERFORMANCE—RESCISSION.

A railroad company agreed to perform certain work by a stipulated time unless it is "by reason of the elements, litigations, strikes, financial panics, epidemics, or any other cause unforeseen or beyond the control of said railroad company, its successors or assigns, hindered or delayed or otherwise prevented from properly prosecuting said work. In such case, time not being the essence of this contract, the date herein fixed for completion * * * will not be adhered to, but credit for the time so lost shall be given and allowed to said railroad company, its successors or assigns, and the time so lost shall be added to that herein required for the completion of" this contract. *Held* that, whether or not the company could ever be defaulted under the contract, Rev. Civ. Code La. art. 2765, providing that "the proprietor has a right to cancel at pleasure the bargain he has made, even in case the work has already been commenced, by paying the undertaker for the expense and labor already incurred, and such damages as the nature of the case may require," gave the contracting parties the right to declare the contract at an end at any time before its completion.

Appeal from the Circuit Court of the United States for the Western District of Louisiana.

The following statement is reprinted from appellee's brief:

The appellee, the Board of Levee Commissioners of the Tensas Basin Levee District (whom we will hereafter designate as the "Levee Board"), brought suit in the district court of Richland parish, La., against the Louisiana, Arkansas & Missouri Railroad Company (which we will hereafter designate as the "Railroad Company"), to annul certain contracts and conveyances made by the Levee Board to the Railroad Company, of some 700,000 acres of land granted to the Levee Board by the state of Louisiana. The suit was removed for trial into the United States circuit court for the Western district of Louisiana; and, from an adverse judgment, restoring the lands in controversy to the Levee Board, the Railroad Company has appealed. The appellant asserts title to the lands in controversy by virtue of the following contracts between it and the Levee Board, which, for the convenience of the court, we print in full:

First Agreement.

"Dy. Sheriff of Richland Parish, La.

"Exhibit A. Contract.

"These articles of agreement, made and entered into this third day of May, A. D. 1889, at Rayville, in the state of Louisiana, by and between the Board of Levee Commissioners of the Tensas Levee District and the Louisiana, Arkansas and Missouri Railroad Company, of Arkansas, witnesseth: That for and in consideration of the payments hereinafter provided for, and agreed to be made by the said Board of Levee Commissioners of the Tensas Basin Levee District, the said the Louisiana, Arkansas and Missouri Railroad Company agrees and binds itself to construct and complete above overflow, in a thorough and workmanlike manner, under the supervision and direction of the Board of State Engineers of the State of Louisiana, and thereafter to maintain, all that certain embankment or portion of its roadbed proposed by said Railroad Company to be located in the state of Arkansas, between a point where the line of railroad projected by said company shall cross Crooked Bayou, in section ——, township —— south, range —— west, and a point on the northern terminus of what is known as the 'Bayou Macon Ridge,' in

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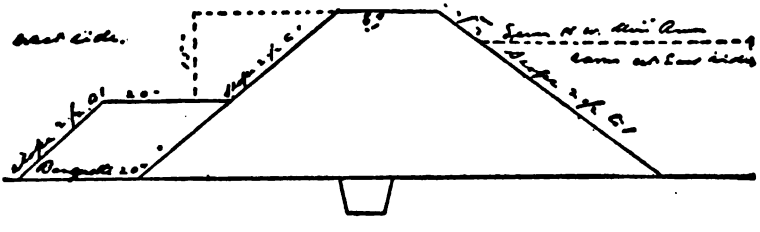
section ——, township —— south, ——, range —— west. Said embankment or roadbed, when constructed, may be forever afterwards used as its roadbed by the said Louisiana, Arkansas and Missouri Railroad Company, its successors and assigns. The course of said embankment is to be in a general northerly and southerly direction on the west of Bayou Macon. Said embankment shall be constructed according to either one of the two following specifications, except where the same, or either of them, may hereafter, upon the request of said Railroad Company, be modified by the said board of state engineers, that is to say:

"Specification 1.

"Said embankment shall have a width on top not less than eight (8) feet, and side slopes not steeper than three feet horizontal to one foot vertical; It shall be built and maintained up to a height of not less than three and one-half (3½) feet above the elevation of the highest known water marks in the Mississippi river, in the same latitude. It shall be constructed of earth, free from all trash, brush, or perishable matter. All stumps, logs, roots, stalks, weeds, grass, trash, and perishable matter of every kind shall be removed. A muck ditch shall be cut along the center line four (4) feet wide on top, two (2) feet wide on the bottom, and three feet deep. All trees coming within the base of the embankment shall be cut to the surface of the ground, and all decayed roots and stumps shall be grubbed out. All buried logs, brick walls, and other material considered unsuitable shall be removed. A berme of not less than fifteen (15) feet in width must be left undisturbed on the east side, and of not less than fifty (50) feet on the west side of the line.

"Or, Specification 11.

"Said embankment shall have a width on top of not less than eight (8) feet, and side slopes not steeper than two and one-half (2½) feet horizontal, to one (1) foot vertical. It shall be built and maintained up to a height not less than two and one-half (2½) feet above the elevation of the highest known water marks in the Mississippi river in the same latitude. Whenever said embankment is over fifteen (15) feet high, there shall be added thereto on the west side thereof an 'Extra Base' or 'Banquette,' twenty (20) feet wide, level on top, and extending up to within fifteen (15) feet of the top of the main embankment, as shown in the following diagram:



"Said embankment shall be constructed of earth, free from all trash, brush, or perishable matter. All stumps, logs, roots, stalks, weeds, grass, trash, and perishable matter of every kind shall be removed. A muck ditch shall be cut along the entire line, four (4) feet wide on top, two (2) feet wide on the bottom, and three (3) feet deep. All trees coming within the base of the embankment shall be cut to the surface of the ground, and all decayed roots and stumps shall be grubbed out. All buried logs, brick walls, and other material considered unsuitable shall be removed. A berme of not less than fifteen (15) feet in width shall be left undisturbed on the east side, and of not less than fifty (50) feet on the west side of the line.

"In consideration of the covenants and agreements hereinabove contained, and made by the Louisiana, Arkansas and Missouri Railroad Company, the Board of Levee Commissioners of the Tensas Basin Levee District agrees and binds itself and its successors to pay or cause to be paid to the Louisiana, Arkansas and Missouri Railroad Company, its successors or assigns, for the construction of said embankment and the annual maintenance thereof, as

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follows, viz.: First. Upon the completion of said embankment, fifty thousand ($50,000) dollars in cash, or in the bonds the said Board of Levee Commissioners is or may be authorized to issue. Second. A five (5) mill tax in cash, annually, upon all taxable property subject to taxation for levee purposes, that now is, as well as that which may hereafter be, embraced within the limits of the Tensas Basin Levee District, for a period of twenty years from the first day of January, A. D. 1891; said tax shall be paid annually. The first installment shall be paid on the first day of May in each and every year thereafter, until the completion of said time of twenty years. Third. A one and one-half cents per acre tax, in cash annually, upon all lands subject to taxation for levee purposes, that are now, as well as those that may hereafter be, embraced within the limits of the Tensas Basin Levee District, for a period of ten (10) years from the first day of January A. D. 1891. Said tax shall be paid annually, at the same time and in the same manner as the five-mill tax hereinbefore provided for is to be paid. Fourth. Ninety per centum of the gross proceeds derived from the sales of land located within the limits of the Tensas Basin Levee District, if any such sales have been made by the state of Louisiana, from and after the sixth day of January, A. D. 1888, and to which proceeds the said Board of Levee Commissioners became and were entitled by virtue of Act No. 59 of the Laws of 1886; also ninety per centum of the gross proceeds derived from the sales of any and all lands now belonging, or that may hereafter belong, to, and become the property of, said Board of Levee Commissioners by virtue of Act No. 77 of the Laws of 1888, and now, as well as those which may hereafter be, embraced within the limits of the Tensas Basin Levee District, for a period of ten years next ensuing from and after the date hereof, whether those are lands originally granted by congress to the state of Louisiana, or whether said lands be lands heretofore or hereafter forfeited to, or bought in by or for, or sold to, the state at tax sales, for nonpayment of taxes: provided, however, and it is expressly understood and agreed, that no payment shall be asked for, nor made under this provision, until the work herein contemplated and agreed to be constructed shall be completed. The first payment shall be for all lands sold prior to such completion, and after the sixth day of January, A. D. 1888. Thereafter payments shall be made on the first days of November and May, in each and every year until the full end of said period of ten years from the date hereof, for all lands sold during the six months immediately preceding. And the state of Louisiana, having, by legislative enactment (Act No. 77, Laws 1888), given, granted, bargained, donated, conveyed, and delivered unto the Board of Levee Commissioners of the Tensas Basin Levee District all the lands which at the date of the passage of said act belonged, or that might hereafter belong, to said state of Louisiana, and embraced within the limits of the Tensas Basin Levee District, as said limits were in and by said Act No. 77 of the Laws of 1888 reconstituted and enlarged, and therein made provision for the conveyance of said lands to said Board of Levee Commissioners, by proper instruments of conveyance, and further provided that, upon said deeds being properly recorded, the title to said lands, with the possession thereof, should vest absolutely in said Board of Levee Commissioners, its successors and grantees, with full power and authority to said board to sell, mortgage, pledge, or otherwise dispose of said lands, in such manner and at such times and for such prices as to said board shall seem proper. The Louisiana, Arkansas and Missouri Railroad Company, its successors and assigns, may, at any time after the completion of said work, in lieu of receiving said ninety per centum of said cash proceeds, select at its option, in such localities and in such quantities as it or they may from time to time desire, ninety per centum of the lands that are now, as well as those which may hereafter be, embraced within the limits of the Tensas Basin Levee District, and be so conveyed to said Board of Levee Commissioners. And, immediately after each selection of aforesaid said lands so selected, with the immediate possession thereof, shall be conveyed to said Railroad Company, its successors or assigns, by said Board of Levee Commissioners, or its successors, by proper instruments of conveyance.

"It is further stipulated and agreed that said Railroad Company shall, from and after the execution and delivery of this contract, be permitted and have the right to exercise said option, which, however, shall take effect only from

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and after the completion of the work herein provided for. But, from and after the exercise of said option, no lands shall be sold by said Board of Levee Commissioners until after the selection of the ninety per centum to which said company may be entitled, without the written consent of said company be first obtained. Active operations on the work herein contemplated and agreed to be performed by said Railroad Company shall be commenced within ninety days next ensuing after the date hereof; and the whole of said embankment shall be fully completed on or before the first day of October, A. D. 1890, unless said Railroad Company, its successors or assigns, are, by reason of the elements, litigations, strikes, financial panics, epidemics, or any other causes unforeseen or beyond the control of said Railroad Company, its successors or assigns, hindered and delayed or otherwise prevented from properly prosecuting said work. In such case, time not being the essence of this contract, the date herein fixed for completion will not be adhered to, but credit for the time so lost shall be given and allowed to said Railroad Company, its successors or assigns; and the time so lost shall be added to that herein required for the completion of this contract. It is understood and agreed that no payment shall be asked for nor made under any of the several provisions hereinabove contained until the work herein contemplated and agreed to be constructed shall be completed.

"Said Board of Levee Commissioners further agree to give, grant, bargain, sell, and convey unto said Railroad Company, its successors or assigns, a certain piece or strip of land contained and included between two parallel lines, two hundred (200) feet apart, situated one on each side of the center line of the roadbed of said Railroad Company as the same has been, now is, or may hereafter be, selected and located by said Railroad Company, its successors and assigns, through, across, and over any of the lands that now do or may hereafter belong to said Board of Levee Commissioners. Together with the right to take from lands outside of said limits so much and such parts thereof as may by said Railroad Company, its successors or assigns, be deemed necessary for its purposes or for the construction of the embankment herein provided for. Said Railroad Company, its successors or assigns, may, by their agents or otherwise, enter at once into and upon said lands, and construct their road. It is further understood and agreed that the covenants, conditions, and provisions herein contained shall in all things be valid, subsisting, and binding upon the successors and assigns of the respective parties hereto.

"In witness whereof, the said Board of Levee Commissioners of the Tensas Basin Levee District hath caused its official seal to be hereunto affixed, and the same to be attested by its secretary, and these presents to be executed in duplicate, and subscribed by its president. And the said the Louisiana, Arkansas and Missouri Railroad Company hath caused its seal to be hereunto affixed, and these presents to be executed in duplicate, and subscribed by its president, the day and year first hereinabove mentioned.

"In presence of W. G. Wright & Wiley P. Mangham, competent witnesses.

"The Board of Levee Commissioners of the Tensas Basin Levee District,

"[Seal.] By H. P. Wells, President.

"Attest:

"Stephen Faulk, Secretary.

"The Louisiana, Arkansas and Missouri Railroad Company,

"[Seal.] By Harlow M. Hoyt, President.

"Witnesses:

"W. G. Wright,

"Wiley P. Mangham."

Second Agreement.

"Exhibit B.

"Articles of Agreement.

"These articles of agreement, made and entered into this twenty-fifth day of July, A. D. 1890, at Rayville, in the state of Louisiana, by and between the Board of Levee Commissioners of the Tensas Basin Levee District and the Louisiana, Arkansas and Missouri Railroad Company, of Arkansas, witnesseth:

"That whereas, an agreement was heretofore entered into by and between

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the parties hereto, bearing date the 3d day of May, 1889, providing for the construction by the Louisiana, Arkansas and Missouri Railroad Company of a certain portion of its embankment or roadbed in the state of Arkansas, according to certain specifications in said contract set forth, and providing further for certain payments to be made therefor by the Board of Levee Commissioners of the Tensas Basin Levee District; and whereas, said Railroad Company, having been so requested, has agreed to relinquish and forever discharge said Board of Levee Commissioners of the Tensas Basin Levee District from making a part of the payments in and by said contract of May 3d, 1889, agreed to be made, and has also agreed to do and perform certain other acts as hereinafter set forth, but only in consideration of said Board of Levee Commissioners changing the date of completion of said embankment from October 1st, 1890, to October 1st, 1891, and conveying and transferring the lands now owned by said Board of Levee Commissioners to said Railroad Company upon the execution and delivery of this contract: Now, therefore, in consideration of the premises, and of the sum of one dollar each to the other in hand paid on or before the ensealing and delivering of these presents, the receipt whereof each from the other is here acknowledged, said parties hereto do mutually covenant, promise, and agree as follows, viz.: First. The fifty thousand dollars in cash or bonds, and the one and one-half cents per acre tax in and by said contract of May 3rd, 1889, agreed to be paid to said Railroad Company, is hereby relinquished by said Railroad Company, and the Board of Levee Commissioners of the Tensas Basin Levee District is forever discharged from the payment of the same, or either thereof. Second. The Louisiana, Arkansas and Missouri Railroad Company agrees to execute and deliver to said Board of Levee Commissioners its corporate bond in the sum of one hundred thousand dollars, conditioned to keep the embankment in and by said contract of May 3rd, 1889, agreed to be constructed, in repair during the corporate existence of said the Louisiana, Arkansas and Missouri Railroad Company, but no longer, and to renew said bond whenever, during said corporate existence, a surety thereon shall die or become insolvent. Third. The Louisiana, Arkansas and Missouri Railroad Company covenants, promises, and agrees to begin work, or cause work to be commenced, at Delhi, Louisiana, with a good force of hands, within ninety days after work is resumed upon the embankment, in said contract of May 3rd, 1889, mentioned, and to continue actively and earnestly at work until a railroad is completed and in operation, northward from Delhi to and as far as the northern terminus of the Bayou Macon Hills, at the Boeuff Cut-Off, in Chicot county, Arkansas. And said railroad company further covenants, promises, and agrees so [to] complete said embankment in said contract agreed to be constructed, and entire line of railroad from Helleys, Arkansas, to Delhi, Louisiana, on or about the first day of October, A. D. 1891, unless it, its successors or assigns, are by reason of the elements, litigations, strikes, financial panics, epidemics, or any other cause unforeseen or beyond the control of said Railroad Company, its successors or assigns, hindered or delayed or otherwise prevented from properly prosecuting said work. In such case, time not being the essence of this contract, it is particularly understood and agreed that the date herein fixed for the completion of said embankment and said railroad will not be adhered to, but credit for the time so lost shall be given and allowed to said Railroad Company, its successors or assigns; and the time so lost shall be added to that herein required for the completion of said contract of May 3rd, 1889, and the fulfillment of this contract. Fourth. The Louisiana, Arkansas and Missouri Railroad Company further covenants, promises, and agrees, not only to keep said embankment across said Boeuff Cut-Off, in Chicot county, Arkansas, in repair, but also to place thereon a standard-gauge railroad, and to maintain and operate the said railroad after it is completed.

"The Board of Levee Commissioners of the Tensas Basin Levee District, on its behalf, agrees for itself and its successors as follows: First. The date in the contract of May 3rd, 1889, fixed for the completion of said embankment in Chicot county, Arkansas, viz. the first day of October, 1890, shall be, and is hereby, changed and extended to October 1st, A. D. 1891, to the same intent and with the like effect as though the date originally designated in said contract had been October 1st, A. D. 1891, instead of October 1st, A. D. 1890.

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Said change of date, however, shall not abrogate nor in any manner affect any of the provisions in said contract contained, relative to the various contingencies and conditions therein provided for allowance of additional time, but the same shall remain and continue as in said contract set forth. Second. Immediately upon the execution and delivery of this contract, said Board of Levee Commissioners of the Tensas Basin Levee District shall convey, by proper instruments of conveyance, executed by its president in behalf of and in the name of said board, to the said Louisiana, Arkansas and Missouri Railroad Company, its successors or assigns, all of the land now belonging to said Board of Levee Commissioners of the Tensas Basin Levee District. Said instruments of conveyance shall respectively contain the following provisions, viz.: 'In the event of the failure of the said the Louisiana, Arkansas and Missouri Railroad Company, its successors or assigns, to construct that certain portion of its roadbed or embankment in Chicot county, Arkansas, described in a certain contract made by and between the parties hereto, bearing date the 3rd day of May, 1889, according to either one or two specifications prescribed in the said contract, which said contract is of record in the office of the recorder of the parish in which the said lands are situated, within the periods and additional times allowed to said Railroad Company, and upon the judicial determination of such failure, then and in such cases said the Louisiana, Arkansas and Missouri Railroad Company covenants, promises, and agrees to reconvey and return the lands herein conveyed to said Board of Levee Commissioners of the Tensas Basin Levee District.' 'The transfer and conveyance of said lands is made under and in pursuance of the authority given to said board in and by the laws of the state of Louisiana, and as a means and mode of making part payment for the construction of an embankment according to certain specifications prescribed by the Board of State Engineers of the State of Louisiana, and fully set forth in said contract of May 3rd, 1889, which said embankment, when completed, said Board of State Engineers have certified will aid in protecting the Tensas Basin Levee District from overflow.' It is mutually understood and agreed, and with the exception of the change and modifications herein made or provided for, the contract of May 3rd, 1889, between the parties hereto, shall remain unchanged and in full force and effect.

"In witness whereof, the said parties have caused their respective corporate seals to be hereunto affixed, and these presents to be subscribed by their respective presidents, the day and year hereinabove first mentioned.

"In presence of William J. Curtis and Thomas C. Wellman, competent witnesses.

"The Board of Levee Commissioners of the Tensas Basin Levee District,

"[Seal.] H. P. Wells, President.

"Attest:

"Stephen Faulk, Secretary.

"The Louisiana, Arkansas and Missouri Railroad Company,

"[Seal.] Harlow M. Hoyt, President.

"Witnesses:

"W. J. Curtis as to H. P. W.

"T. C. Wellman as to H. M. H."

Third Agreement.

"Exhibit C.

"Articles of Agreement.

"These articles of agreement, made and entered into this, the twelfth day of October, A. D. 1891, at Rayville, in the state of Louisiana, by and between the Board of Levee Commissioners and the Louisiana, Arkansas and Missouri Railroad of Arkansas, witnesseth: That for and in consideration of the sum of one dollar each to the other in hand paid, on or before the ensealing and delivery of these presents, the receipt whereof each from the other is hereby acknowledged, said parties hereto do mutually covenant, promise, and agree as follows, viz.: First. The several dates named in said contracts of May 3rd, 1889, and July 25th, 1890, for the completion of said contracts, namely, October 1st, 1890, and October 1st, 1891, shall be, and they are hereby, changed and extended to December 31st, 1893, to the same intent and with the like

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effect as though said date, December 31st, 1893, had been the date originally designated in said contracts, instead of October 1st, 1890. And, second. The period in said contracts limited for the levy and payment of the five-mill tax shall be, and it is hereby, changed to and held to mean a period of twenty years from the first day of January, in the year following that year in which the work in said contracts contemplated shall be completed, instead of twenty years from the first day of January, A. D. 1891. The first installment shall be paid on the first day of May, in the year following that year in which the work contemplated shall be completed, and the subsequent installments on the first day of May in each year thereafter, until the full end and completion of said time of twenty years. Third. With the exception of the changes and modifications herein provided for, the contracts of May 3rd, 1890, and July 25th, 1890, between the parties thereto, and shall remain unchanged and in full force and effect.

"In witness whereof, the said parties hereto have caused their respective corporate seals to be hereunto affixed, and these presents to be subscribed by their respective presidents, the day and year hereinabove mentioned, in presence of L. N. Polk and A. L. Hopkins, competent witnesses.

"The Board of Levee Commissioners of the Tensas Basin Levee District,
"[Seal.] By H. P. Wells, President.

"The Louisiana, Arkansas and Missouri Railroad Company,
"[Seal.] By Harlow M. Hoyt, President.

"Witnesses:
"L. N. Polk.
"A. L. Hopkins."

Conveyance to Railroad Company.

"Exhibit 5.

"Deed of Land Situated in Richland Parish, Louisiana, from the Board of Levee Commissioners of the Tensas Basin Levee District to the Louisiana, Arkansas and Missouri Railroad Company.

"State of Louisiana, Parish of Richland. Know all men by these presents, that I, Hansel P. Wells, acting herein for and as president of the Board of Levee Commissioners of the Tensas Basin Levee District of the State of Louisiana, and acting herein also in pursuance to a resolution passed by said Board of Commissioners at a regular meeting thereof held on the 25th day of July, A. D. 1890, and in pursuance to the terms of a contract entered into by said board on said date with the Louisiana, Arkansas and Missouri Railroad Company, a corporation duly organized under and by virtue of the laws of the state of Arkansas, have this day sold, and I do by this act sell, transfer, set over, and deliver unto said the Louisiana, Arkansas and Missouri Railroad Company, the following described tracts or parcels of land, situated in the parish of Richland, and in the state of Louisiana, belonging to said Board of Levee Commissioners, to wit: [Description omitted.] To have and to hold said tracts or parcels of land unto the said the Louisiana, Arkansas and Missouri Railroad Company, its successors and assigns, forever. The consideration for which the above sale is made is the completion on the part of said Railroad Company of the embankment in the state of Arkansas agreed to be constructed by said Railroad Company in and by a certain contract dated May 3rd, 1889. In event of the failure of the said the Louisiana, Arkansas and Missouri Railroad Company, its successors or assigns, to construct that certain portion of its roadbed or embankment in Chicot county, Arkansas, described in a certain contract made by and between the parties hereto, bearing date the 3rd day of May, 1889, according to either one of two specifications prescribed in the said contract, which said contract is of record in the office of the recorder of the parish of Richland, in which the lands aforesaid are situated, within the periods and additional to said Railroad Company, and upon the judicial determination of such failure, then and in such cases said the Louisiana, Arkansas and Missouri Railroad Company covenants, promises, and agrees to convey and return the lands herein conveyed to said Board of Levee Commissioners of the Tensas Basin Levee District, free from any incumbrances thereon placed by said Railroad Company, its successors or assigns. The transfer and conveyance of said lands is made under and

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in pursuance of the authority given to said board in and by the laws of the state of Louisiana, and as a means and mode of making part payment for the construction of an embankment according to certain specifications prescribed by the Board of the State Engineers of the State of Louisiana, and fully set forth in said contract of May 3rd, 1889, which said embankment, when completed, said board of state engineers has certified will aid in protecting the Tensas Basin Levee District from overflow. It is agreed and understood that said Board of Levee Commissioners only transfers such right, title, and interest in and to said land as it owns. It is agreed and understood that the deed is made subject to such release and deductions as may be made previous to the first day of March, A. D. 1891, by said Board of Levee Commissioners, under and in accordance with certain rules adopted by said board on the 17th day of December, A. D. 1889. It is further agreed and understood that said Board of Levee Commissioners, upon the final completion of said embankment, shall make a full and complete transfer to said Railroad Company of all such lands as it, said Board of Levee Commissioners, may at that time own in said parish of Richland, and shall then further ratify and confirm in said Railroad Company, its successors or assigns, the transfer of the within described lands in such manner and in such form as its or their counsel learned in the law may advise or require from it, save and except such of the said lands as may be released to other and former owners previous to said first day of March, A. D. 1891, under and by virtue of said rules.

"Thus done and signed, this fifteenth day of September, one thousand eight hundred and ninety, in the presence of Simon Stein and Stephen Faulk, competent witnesses who sign hereto with me, the president of said Board of Levee Commissioners.

"The Board of Levee Commissioners of the Tensas Basin Levee District,
"By H. P. Wells, President.

"Attest:
"Simon Stein.
"Stephen Faulk."

Authority of the Levee Board.

The asserted authority of the Levee Board to make the foregoing contracts and conveyances of land to the Railroad Company must be found, if found at all, in Act No. 26 of 1884, Act No. 59 of 1886, and Act No. 77 of 1888, and in articles 214, 215, and 216 of the state constitution.

The constitutional provisions are as follows:

"Art. 214. The general assembly may divide the state into levee districts, and provide for the appointment or election of levee commissioners in said districts, who shall, in the method and manner to be provided by law, have supervision of the erection, repairs and maintenance of the levee in said districts; to that effect it may levy a tax not to exceed five mills on the taxable property situated within alluvial portions of said districts subject to overflow."

"Art. 215. The provisions of the above two articles cease to have effect whenever the federal government shall assume permanent control and provide ways and means for the maintenance of levees in this state. The federal government is authorized to make such geological, typographical, hydrographical and hydrometrical surveys and investigations within the state, as may be necessary to carry into effect the act of congress to provide for the appointment of a Mississippi river commission for the improvement of said river, from the head of the passes near its mouth to the headwaters, and to construct and protect such public works and improvements as may be ordered by congress under the provisions of said act."

"Art. 216. The general assembly shall have power, with the concurrence of an adjacent state or states to create levee districts composed of territory partly in this state, and partly in such adjacent state or states, and the levee commissioners for such district or districts shall possess all the powers provided by article 214 of this constitution."

These articles are amended by Act No. 112 of 1884, subsequently adopted, and which reads as follows, to wit.

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"The general assembly may divide the state into levee districts and provide for the appointment or election of levee commissioners in said districts, who shall, in the method and manner to be provided by law, have supervision of the erection, repair and maintenance of the levees in said districts; to that effect the levee commissioners may levy a tax not to exceed ten mills on the property situated within the alluvial portions of said district subject to overflow; provided that in case of necessity to raise additional funds for the purpose of constructing, preserving, and repairing any levees protecting the lands of a district the rate of taxation herein limited may be increased, when the rate of such increase, and the necessity and purpose for which it is intended, shall have been submitted to a vote of the property tax payers of such district, paying taxes for himself, or in any representative capacity, whether resident or non-resident, or property situated within the alluvial portion of said district subject to overflow, and a majority of those in number and value voting at such an election shall have voted therefor."

It will hereafter be seen that, as far as this case is concerned, the amendment above cited does not in the least alter the questions at issue in this case. The Tensas Basin Levee District was created by Act No. 26 of the Acts of 1884. It is unnecessary to recite the provisions of that act in extenso, because it was repealed by Act No. 59 of the Acts of 1886. We call attention, however, to the fact that the object of the creation of the board, as declared in the law, was "to order the construction of levees within the limits of the district, on such streams and such places as shall be recommended by the State Board of Engineers; to construct and maintain, out of the funds of the district, a levee across the Boeuff Cut-Off, a stream connecting the waters of Bayou Macon with the headwaters of Boeuff river, in Arkansas, provided the assent of the authorities of the state of Arkansas can be obtained," and also to join in the construction of certain levees in the state of Arkansas, named in the act, if the assent of the authorities of the state of Arkansas can be obtained, and the citizens, corporations, and other persons interested shall contribute one-half of the expense of such construction. The act of 1886 practically repeated the declared purposes of the act of 1884. Under section 17 of this last-cited act, the Levee Board is authorized "to join in with any levee district embracing the counties of Chicot and Desha, in the state of Arkansas, for mutual protection, in compliance with article 216 of the constitution." By Act No. 77 of the Acts of 1888 the foregoing was amended in the following particulars: Section 1 was amended by declaring that the purpose of the board was to raise, by taxation or otherwise, a revenue to protect the lands located therein from inundation, by constructing, maintaining, and repairing levees and other works of public improvements. Section 9 was amended by reducing the power to levy local assessments to 5 cents per acre, instead of 10 cents, and that in order to provide additional means to carry out the purposes of the act, and to furnish resources to enable the board to assist in developing, establishing, and completing, either within or without the state, a system of levees and other works of improvement designed to aid in protecting property in the Tensas Basin Levee District from all disastrous floods, all lands belonging to the state situated in said district, whether granted to it by the federal government, or acquired by it by the forfeiture for nonpayment of taxes, were "given, bargained, and donated," etc., to the Levee Board, who were invested with the power and authority "to sell, mortgage, pledge, or otherwise dispose of the same in such manner, and at such times and at such prices, as to the board shall seem proper." But that all proceeds derived therefrom shall be deposited in the state treasury, to the credit of the Tensas Levee District, and shall be drawn out only upon warrants of the president of the State Board, properly attested, as provided by this act. Section 17 of the act of 1888 remained unrepealed and unaffected by this act. That section authorized the board to join in with any levee district embracing the counties of Chicot and Desha, in the state of Arkansas, for mutual protection, in compliance with article 216 of the constitution.

Pleadings.

Complainant attacks the agreements had with the railroad company, culminating in the attempted conveyance to the latter of the immense body of land

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therein described, as void, on substantially the following grounds: (1) That the agreement to convey and conveyance were conditional only, and upon the express stipulation and agreement that the failure of the Railroad Company to perform the conditions therein recited within the time stated (the last date being December 31, 1893) dissolves and avoids the contracts and conveyance; that the limit within which the Railroad Company had the right to do the work has long since expired; the Railroad Company has abandoned the work, and had done so long prior to the institution of this suit; and the grant is therefore forfeited. (2) That the performance of the condition is now impossible, because the laws of the state of Arkansas forbid the same. (3) That the alleged conveyance was void as a sale, because no price was paid, or was agreed to be paid. (4) That it was void as an exchange, because no property was given or stipulated to be given in exchange. (5) That the act was void if considered as an onerous donation, because not made pursuant to the forms of law. (6) That said board of commissioners had no power or authority to sell or dispose of said lands, except for the purposes of constructing or repairing levees and other works of public improvement, to protect the Tensas Basin Levee District from inundation and injury by floods of the Mississippi river, and that there was no authority to dispose of them in aid of the construction or maintenance of a railroad. (7) That the law authorizing the sale required that the proceeds should be deposited in the state treasury. From all of which it results (1) that the contracts and conveyance were ultra vires and void; and (2) if not so, have become forfeited by the failure of the grantee to perform the conditions subsequent annexed to the grant.

In an amended bill the same allegations in effect are made, and the nullity of the various agreements asserted on the ground, substantially, that the obligations assumed by the Levee Board in the several agreements were ultra vires, and prohibited by article 56 of the state constitution; that the board was without authority to contract for the construction of any sort of works in the state of Arkansas, without the consent of the authorities of that state; that the works contemplated were forbidden by the laws of Arkansas, and therefore any obligation to pay for such works was void ab initio; that the contracts with the Railroad Company contemplated the construction of a continuous line of embankment between certain designated points, and the construction and operation of a railroad between certain points; the railroad to run over the embankment as far as necessary; that the contract was an indivisible one, and utterly beyond the power of the Levee Board to make; that the statement made in the last agreement reciting that the transfer was made in consideration of the release by the Railroad Company of the obligation of the Levee Board to pay $50,000 in bonds, and to levy a certain tax, and the statement that the transfer was part payment for work already done, were false and fraudulent, in that the obligation of the Levee Board to issue bonds and levy taxes, if not ultra vires, was conditional only, and had lapsed by reason of the failure of the company to perform the conditions precedent; that the Railroad Company had never, even if the contract had been valid, earned any part of it, and the pretended release of the Levee Board from an obligation which did not exist, as a consideration for the transfer of property admitted to be worth $500,000, is fraudulent and void upon its face. The grounds of attack of the conveyance to the Levee Board may be summarized under two heads: (1) Ultra vires; (2) failure of the Railroad Company to perform the conditions and do the work which were the alleged consideration of the transfer.

The Railroad Company answers, substantially, as follows: After admitting the capacity of the complainant company, the organization of the board, etc., it admits the execution of all contracts alleged upon in the petition; claims, however, that the statement of these contracts, made by the complainant, is not fair; and therefore inserts the contracts at length in its answer. It specially denies that the Levee Board "was imperatively required by each of said acts to deposit the price or proceeds of said lands, when sold or disposed of, in the treasury of the state"; on the contrary, avers that the proceeds which were to be deposited in the treasury of the state, under the acts aforesaid, were such cash proceeds as might arise from the sale or mortgage of the lands, and has no reference to such lands that might be disposed of

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otherwise than by sale or mortgage. It is admitted that plaintiff and defendant, on the 3d of May, 1889, entered into a contract substantially as alleged, but that the plaintiff has failed to note an important qualification of said contract, which it sets out as follows: "If, by reason of the elements, litigations, strikes, financial panics, epidemics, or any other causes unforeseen, or beyond the control of the Railroad Company, its successors or assigns, be hindered or delayed or otherwise prevented from properly prosecuting said work, in such case, time not being the essence of this contract, the date herein fixed for the completion will not be adhered to, but credit for the time so lost shall be given and allowed to said Railroad Company, its successors or assigns, and the time so lost should be added to that herein required for the completion of the contract." The defendant admits that the Railroad Company entered into another contract on the 25th day of July, 1890, which it sets forth at length. It admits that the present Board of Commissioners of the Tensas Basin Levee District did make and sign the conveyance mentioned and referred to in the bill of complaint, which it sets forth at length. It avers that prior to entering into the contract of October 12, 1891, the Levee Board appointed a committee composed of its members, to confer with the officers of the defendant in relation to the delay in the completion of said embankment and railroad, under the contracts of May 3, 1889, and July 25, 1890; that said committee, in writing, reported to the Levee Board the result of their investigation, and recommended the execution of said contract of October 12, 1891. It gives the report of the committee in full; avers that the said report was laid before the Tensas Basin Levee Board; that the Levee Board adopted the report, and extended the time for the completion, as set forth in the contract which follows. It denies that the time within which said embankment was to have been completed, under the terms of the contract of October 12, 1891, has expired, and avers that it is provided in and by said contract, by the third paragraph therein, that, with the exception of the changes made therein or provided for, the contracts of May 3, 1889, and July 25, 1890, between the parties thereto, are in all things confirmed, ratified, and fully approved, and so remained unchanged and in full force and effect. Substantially, the defendant alleges that the contracts were entirely within the power of the Levee Board to make; that they were supported by a lawful consideration; that the Railroad Company has diligently endeavored to carry them out, and is not in default because the delay has been prevented by financial panics, overflows, and litigation which, under the terms of the contract, "time not being of the essence," extended the term indefinitely, as long as for any of the aforesaid causes, or for reasons unforeseen or beyond the control of the Railroad Company, the work was hindered, delayed, or retarded. It claims their work has been so hindered, delayed, and retarded; that the abandonment of the work was caused by the action of the Levee Board in revoking or attempting to revoke the grant; and, in effect, that the grant means that the Railroad Company is to build whenever it may see fit to do so, and that, if it never sees fit to do so, the land belongs to it as payment for what it has already unsuccessfully attempted to accomplish.

John McClure, for appellant.

F. P. Stubbs, R. P. Williams, Chas. J. Boatner, and F. G. Hudson, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PARDEE, Circuit Judge. The statement of this case is a somewhat lengthy matter, and, as we find in the first 27 pages of the brief submitted by Messrs. Boatner & Hudson, of counsel for the appellee, a full and fair statement, we adopt the same without reproducing it in this opinion.

It is conceded that as all the contracts involved in this suit were entered into in the state of Louisiana, and, as the lands involved are wholly situated in the same state, the law of Louisiana governs in

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the determination of the nature and validity of the contracts, and as to the relief which can be given by the courts. The trial judge gave no reasons for his conclusions, and his decree is limited to rescinding the contracts between the parties, rescinding and declaring void the deeds of conveyance of the lands in question, and to enjoining the Louisiana, Arkansas & Missouri Railroad Company from claiming or setting up any rights under the said contracts or deeds of conveyance.

The claims of the appellee (complainant below) are (1) that the contracts are executory only; (2) that on the part of the Board of Levee Commissioners they were ultra vires and void ab initio; (3) that the engagements of each of the parties were prohibited by law at the date of each of the contracts; (4) if the contracts were not ultra vires and void, they had become forfeited by the failure of the grantee to perform the conditions subsequent annexed to the grant.

The contention of the appellant is, of course, the contrary of the foregoing propositions. In the assignments of error the appellant contends that the trial court erred as follows:

"First, in decreeing that the contract made on the 3d day of May, 1889, between the Board of Levee Commissioners of the Tensas Basin Levee District and the Louisiana, Arkansas and Missouri Railroad Company, and all subsequent renewals, modifications, and amendments thereof, and especially the contract between the same parties of date July 25, 1890, and that dated October 12, 1891, be, and the same are, resolved and rescinded and declared null and void; second, in not finding and decreeing for the defendant as prayed in its answer and amended answer; third, in decreeing that the defendant be enjoined from setting up or claiming any rights, privileges, benefits, or advantages arising under the contracts between the plaintiff and defendant, and the deeds of conveyance executed by the plaintiff; fourth, that the court erred in decreeing a reconveyance of said lands without stipulating that the defendant be reimbursed in the amount of such expenditures as it may have made in the performance of such contracts; fifth, that the court erred in decreeing that the contracts between the plaintiff and the defendant were ultra vires; sixth, that the court erred in not dismissing the plaintiff's bill as prayed in defendant's answer; seventh, that the court erred in not decreeing that the plaintiff had full power and authority to make the contracts which were made between the plaintiff and the defendant, set forth in the answer of defendant; eighth, the court erred in not decreeing that the lands mentioned in the conveyances were conveyed to the defendant voluntarily, as a part payment, and that, having been so conveyed, no reconveyance could be decreed; ninth, the court erred in not decreeing that the contracts between the plaintiff and the defendant were valid, binding, and subsisting contracts."

The first, second, third, sixth, and ninth of these assignments are not as specific as are required by our rules, and, in substance, amount to no more nor less than that the circuit court erred in deciding the case for the complainant, instead of for the defendant. The fifth, seventh, and eighth raise the same questions as are embraced in the appellee's contention. The fourth assignment of error presents the question whether the Railroad Company is entitled to a reimbursement of expenditures in case the reconveyance of the lands is decreed.

The counsel for appellant argues that the Tensas Basin Levee Board is one of the public functionaries of the state of Louisiana upon which only ministerial and executive duties devolve, and that, as such creature of the law, it has no standing to question the constitutional-

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ity of any law of the state conferring powers and duties upon it. So far as this contention affects the issues in this case and the right of the said board to bring this suit, and therein set up the unconstitutionality of so much of the act of July 3, 1886 (Sess. Acts, p. 96), as authorizes the Levee Board to use the donated lands for the purpose of assisting in building or completing a system of levees and other works of public improvement without the state of Louisiana, it may be noticed that, by the terms of the act of 1886, the Tensas Basin Levee Board was created a full-fledged corporation, authorized to assess taxes, collect and receive funds, and hold and administer the same; and that, by the same act, a large grant of public lands was made to the said board to be expended discreetly in carrying out the general purposes of the act; and that, so far from being a purely ministerial and executive functionary, it was vested with large discretion, and was made and constituted a fiduciary agent. As a fiduciary, it would seem unquestionable that, if the property belonging to the trust should be appropriated and disposed of in an unlawful manner, it would be not only within its right and power, but its duty, to sue for and recover the same. The question, however, is not very material in this case, because it is not so much the constitutionality of the acts of 1886 and 1888 that is attacked by the complainant as it is the proper construction of the said acts.

It may be noticed, further, that, by article 214 of the constitution of the state of Louisiana, the general assembly is authorized to create levee districts within the state, who shall have supervision of the erection, repairs, and maintenance of the levees in said districts, and of course within the state, and that by article 216 the general assembly is given the power, with the concurrence of the adjacent state or states, to create levee districts composed of territory partly in the state, and partly in adjacent states. It is conceded that the two articles cited are limitations on the power of the legislature; and thus the grave question is presented whether the general assembly has the power to create a levee district wholly within the state, but authorized to build and construct levees outside of the state. The supreme court of the state of Louisiana, in Fisher v. Steele, 39 La. Ann. 448, 1 South. 882, have held that this identical act is constitutional; but the report does not show that this precise question was considered, and it will be observed in regard to this decision that it appears to be based upon the fact that the laws in force at the time negatively prohibited the Tensas Basin Levee Board from undertaking any works in the state of Arkansas except by the consent of and in conjunction and co-operation with the authorities of that state. The learned counsel for the appellee says:

"The state has the power to execute through any agencies which it chooses to select any power which it possesses itself. Therefore the power of the legislature to grant to the Tensas Basin Levee District all of the public lands lying within the state for the purpose of aiding in the construction, within or without the state, of levees or other works of public improvements for the protection of the alluvial lands of the district from overflow, was strictly within the constitutional powers of that body, because, among other reasons, the bulk of the land granted by the state to the Levee Board was granted to the state by the United States government for this very purpose."

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As this is the standpoint of the counsel for the appellee, we are inclined to agree with them that they are not attacking the constitutionality of any of the acts of the legislature of Louisiana. It is contended by the appellee that the contracts in question and the grants of lands thereunder were ultra vires and void, because they contemplated levees and other works wholly without the levee district, and within the state of Arkansas, without the consent of the authorities of said state, and because the railway embankment contracted for was not, and could not be, a system of levees or other work of public improvement, within the meaning of section 9 of the act of 1886, as amended by the second section of the act of 1888. The act of 1886 (section 17) provides that the Board of Levee Commissioners of the Tensas Basin Levee District shall have the right to join in with any levee district embracing the counties of Chicot and Desha, in the state of Arkansas, for mutual protection in compliance with article 216 of the constitution. This provision was left in force by the amendatory act of 1888, and it therefore, considered in connection with article 216 of the constitution to which it refers, is to be treated as a limitation upon the power of the Board of Levee Commissioners in regard to constructing levees or works of public improvement in the state of Arkansas. It is not disputed that the statutes of the state of Arkansas provide for the construction of public levees in Chicot and Desha counties, by and under the authority of the levee boards of said counties; and the case shows—in fact, it is conceded—that the levee boards of those two counties have not joined with the Tensas Basin Levee Board in the building of the embankment or levee contracted to be built by the Railroad Company, nor have the same boards given permission even to build the said embankment, but, on the contrary, have refused such permission, and, as appears by the averments in the defendant's answer, have gone so far in opposition as to contribute to the expense of litigation to prevent the construction by the Railroad Company of such embankment. The statutes of the state of Arkansas providing for the organization of railroad corporations, and regulating the construction of railroads by such corporations, prohibit the building of railroads across streams or water courses in such a manner as to permanently obstruct the stream or water course or impair its usefulness (Mansf. Dig. § 5447, par. 5), from which it follows that, although the Railroad Company may have the right to construct its roadbed in the state of Arkansas, it can neither build a roadbed under its railway charter, nor, without the consent of the authorities of Chicot and Desha counties, build an embankment, either of which will permanently interrupt the free flow of the water through all natural channels.

From these conclusions it would seem that the contract between the Tensas Basin Levee Board and the Railroad Company is not only ultra vires the power of the Levee Board, but otherwise, in its objects and purposes, is a contract impossible to perform.

Section 2 of Act No. 77 of 1888, which amends section 9 of Act No. 59 of 1886, provides as follows:

"That in order to provide additional means to carry out the purposes of this act, and to furnish resources to enable said board to assist in developing,

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establishing and completing, either within or without the state, a system of levees and other works of public improvement, designed to aid in protecting property in the Tensas Basin Levee District from disastrous floods, all lands now belonging, or that may hereafter belong to the state of Louisiana, and embraced within the limits of the Tensas Basin Levee District as herein constituted, shall be, and the same hereby are given, granted, bargained, donated, conveyed and delivered unto said Board of Levee Commissioners of the Tensas Basin Levee District. * * * Said Board of Levee Commissioners shall have the power and authority to sell, mortgage, pledge or otherwise dispose of said lands in such manner and at such times and for such prices as to said board shall seem proper, but all proceeds derived therefrom shall be deposited in the state treasury to the credit of the Tensas Basin Levee District, and shall be drawn out only upon the warrants of the president of said board, properly attested as provided in this act."

The above is the legislative authority for the Board of Levee Commissioners to make the conveyance of the lands in question to the Railroad Company. By the first contract entered into between the parties, the Railroad Company, for the consideration named,

—"Agrees and binds itself to construct and complete above overflow, in a thorough and workmanlike manner, under the supervision and direction of the Board of State Engineers of the State of Louisiana, and thereafter to maintain, all that certain embankment or portion of its roadbed proposed by said Railroad Company to be located in the state of Arkansas, between a point where the line of railroad projected by said company shall cross Crooked Bayou, in section ——, township —— south, range —— west, and a point on the northern terminus of what is known as the 'Bayou Macon Ridge,' in section ——, township —— south, ——, range —— west. Said embankment or roadbed, when constructed, may be forever afterwards used as its roadbed by the said Louisiana, Arkansas and Missouri Railroad Company, its successors, and assigns. The course of said embankment is to be a general northerly and southerly direction on the west of Bayou Macon."

The second contract further described the railroad and embankment to be constructed as follows:

"And to continue actively and earnestly at work until a railroad is completed and in operation, northward from Delhi, to and as far as the northern terminus of the Bayou Macon Hills, at the Boeuff Cut-Off, in Chicot county, Arkansas. And said Railroad Company further covenants, promises, and agrees so [to] complete said embankment in said contract agreed to be constructed, and entire line of railroad from Helleys, Arkansas, to Delhi, Louisiana. * * * Fourth. The Louisiana, Arkansas and Missouri Railroad Company further covenants, promises, and agrees, not only to keep said embankment across said Boeuff Cut-Off, in Chicot county, Arkansas, in repair, but also to place thereon a standard-gauge railroad, and to maintain and operate the said railroad after it is completed."

The consideration for the conveyance of the land as stated in the contract is "the completion on the part of said Railroad Company of the embankment in the state of Arkansas, agreed to be constructed by said Railroad Company in and by a certain contract dated May 3rd, 1889."

From what we have quoted, it will be seen that the object of the contracts between the parties was the construction of an embankment across Boeuff Cut-Off, lowlands in the state of Arkansas, and the building and operation of a railroad from Helleys, Ark., to Delhi, La. The authority given to the Levee Board was to assist in developing, establishing, and completing, either within or without the state, a system of levees and other works of public improvement designed to aid in protecting the property in the Tensas Basin Levee

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District, etc.; and this naturally brings us to the question whether the railroad and embankment, the object of the contract between the parties, were public improvements, within the terms and meaning of the law in question.

Counsel for appellee, relying upon article 56 of the constitution of Louisiana of 1879, as follows:

"The funds, credit, property or things of value of the state, or of any political corporation thereof, shall not be loaned, pledged or granted to or for any person or persons, association, or corporation, public or private; nor shall the state, or any political corporation, purchase or subscribe to the capital stock of any corporation or association whatever, or for any private enterprise. Nor shall the state, nor any political corporation thereof, assume the liabilities of any political, municipal, parochial, private, or other corporation or association whatsoever; nor shall the state undertake to carry on the business of any such corporation or association, or become a part owner therein: provided, the state, through the general assembly, shall have power to grant the right of way through its public lands to any railroad or canal."

—contends: First, that it was beyond the power of the legislature to confer upon the Tensas Levee Board authority to contract for any work or any levees or public improvements designed to prevent the overflow of the Tensas Basin, unless the work, when completed, should be owned and controlled by the public, and not by any private party; second, that a railroad, although upon a solid embankment, is not a work of public improvement; and, third, that such railroad, although it may be in some sense a work of public improvement, is not a work of public improvement designed in fact to aid in protecting property in the Tensas Basin Levee District from overflow.

In McKenzie v. Wooley, 39 La. Ann. 944, 3 South. 128, a case much relied upon by the counsel for appellant, it was declared incidentally that a railway is a public improvement; and in many aspects this is, no doubt, true. It can hardly be denied that an embankment or levee designed to prevent the overflow of the surplus waters of the Mississippi river is a work of public improvement. The record shows with regard to the railway embankment in question that the Louisiana State Board of Engineers reported to the governor of the state as follows:

"The Tensas Basin Levee District has recently entered into an agreement with the Louisiana, Arkansas and Missouri R. R. Company to construct an embankment on the west side of Bayou Macon, and across the stream and lowlands known as 'Boeuff Cut-Off.' Such an embankment, of sufficient length and strength to confine the flood waters of its eastern side in case of breaks in the front levee along the Mississippi river, will give additional security against overflow, and protect the major part of the district, independently of the levee system along the front."

The contention that the public improvements, assisted by the Tensas Basin Levee Board, and designed to aid in protecting property in the Tensas Basin Levee District from overflow, should be owned and controlled entirely by the public as public property, is not well founded. The language of the statute forbids such a narrow construction.

There has been much argument with regard to the effect to be given to the provision of the third contract, which stipulates that:

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"The Railroad Company agrees to complete the work in question on or before December 31st, 1893, unless it, its successors or assigns are, by reason of the elements, litigations, strikes, financial panics, epidemics, or any other cause unforeseen or beyond the control of said Railroad Company, hindered or delayed or otherwise prevented from properly prosecuting said work, in which case, time not being of the essence of this contract, it is understood and agreed that the dates mentioned shall be extended, and the time lost shall not be counted."

The appellant contends that, under this provision, the Railroad Company could not be put in default at the commencement of this suit, nor since, because the case shows that there have been financial panics and litigations which have hindered and delayed the Railroad Company in prosecuting the work, for which reasons, and because it is expressly stipulated that time was not of the essence of the contract, the Railroad Company is entitled to further delay and opportunity to prosecute and complete the work before the contracts providing for the same can be avoided and the reconveyance of the lands can be demanded. The extraordinary unilateral contract made between the Levee Board and the Railroad Company furnishes strong support to the appellant's contention; and, if the contracts can only be declared at an end because of the default of the Railroad Company, we are inclined to think that the appellee can never put the Railroad Company in default, no matter what may be the delay resulting. The laws controlling the whole matter, however, are the Louisiana laws; and under well-recognized Louisiana law, the principles of which are declared in article 2765, Rev. Civ. Code La., to wit, "The proprietor has a right to cancel at pleasure the bargain he has made, even in case the work has already been commenced, by paying the undertaker for the expense and labor already incurred, and such damages as the nature of the case may require," the Tensas Basin Levee Board had the right to cancel the contract and demand the reconveyance of the lands in question at any time on paying the Railroad Company for the expense and labor already incurred in executing the contract, and such damages as the nature of the case required. The institution of the present suit may be taken as a cancellation of the contract on the part of the Tensas Basin Levee Board. If the contracts are held void because ultra vires, equity makes it the duty of the Tensas Basin Levee Board to restore all the consideration received from the Railroad Company before it can demand the reconveyance of the lands. The Railroad Company, in its answer, avers that it has expended in good faith, in procuring the right of way on which to build said embankment, in the building of the same, in the prosecution and defense of litigation, in making surveys, and in other necessary expenses in and about the performance of said contract, a sum in excess of $100,000; but we do not find that this averment is established by the evidence, nor do we find that any specific sum, nor any sum worthy of consideration, has been expended by the Railroad Company otherwise than for and on account of and for the actual benefit of the Railroad Company itself in the preservation of its charter and franchises, and in the construction of its own roadbed in the main distinct and apart from the embankment which was to aid in preventing overflow. Certain it is that the case does not show that

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the Railroad Company has done anything from the date of the first contract to the commencement of this suit which was beneficial to, or in any wise to the advantage of, the Tensas Basin Levee District, nor that the Levee Board has in possession anv consideration received from the Railroad Company which equity requires to be restored.

On the whole case, we are of opinion that the contracts between the Railroad Company and the Tensas Basin Levee Board for the construction of the specific railway and embankment in the state of Arkansas, without the consent and co-operation of the Arkansas authorities, was ultra vires of the Tensas Basin Levee Board; that, because of the existing provisions in the laws of the state of Arkansas and the opposition of the levee boards of Desha and Chicot counties of the state of Arkansas, the contracts in question, in their objects and purposes, were impossible of performance; that the Tensas Basin Levee Board had a right to, and did, cancel the said contracts; that in no aspect of the case is the Railroad Company entitled to compensation for work done and expenses incurred in carrying out the said contracts, nor for advantages which might have resulted from the performance of the same as a prerequisite to the conveyance of the lands in question; and that in all respects the decree of the circuit court appealed from should be affirmed; and it is so ordered.

(87 Fed. 612.)

STORROW et al. v. TEXAS CONSOLIDATED COMPRESS & MANUFACTURING ASS'N.

(Circuit Court of Appeals, Fifth Circuit. May 17, 1898.)

No. 681.

1. CORPORATIONS—DIVIDENDS ON STOCK—POWERS OF DIRECTORS.
   While it is largely a matter of discretion with the directors whether to declare a dividend out of the profits, or use them in the business of the company, there is a limit to this discretion; and the courts will not allow them to oppress the holders of preferred stock by refusing to declare dividends when the net profits and character of the business clearly warrant dividends.
2. SAME—PREFERRED STOCK.
   The face value of preferred stock is in the nature of a debt against the corporation, and the interest thereon becomes a debt as soon as it can be shown there are profits wherewith to pay it.
3. EQUITY JURISDICTION.
   A bill by a holder of preferred stock against a corporation alleging that it has refused to pay its guarantied dividends on its preferred stock, and refused the holders thereof their rights; that judgments are being taken against it; that it is insolvent, and cannot be operated as a going concern with profit, and ought to be disintegrated, and the assets divided; that part of its property has been sold without authority; and asking for a lien, the foreclosure thereof, the marshaling of the assets, and the appointment of a receiver,—presents a case for a court of equity.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

The original bill filed in this case November 18, 1896, alleges that the complainant Charles Storrow is a resident and citizen of Brookline, in the state

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of Massachusetts; that he brings this suit for himself and all others similarly situated and interested, to make themselves parties thereto, and complains of the Texas Compress & Manufacturing Association, a corporation, with its principal place of business in the county of Smith, state of Texas. It alleges that it was chartered on the 18th day of March, 1891, with an authorized capital of $1,000,000, divided into 10,000 shares; its purpose was the manufacture of cotton, cotton-seed oil, cotton ties, and pressing cotton; that in accordance with a vote at a meeting of its stockholders held at Ft. Worth, Tex., on the 11th day of May, 1891, and in accordance with section 2, art. 7, of the by-laws approved by said association, seven compresses were purchased; $700,000 of common stock, and $350,000 of preferred stock, were issued. Subsequently, four other bills were filed, called "aid bills." Said complainants claim to be owners and holders for value of some 400 shares of said preferred stock. The exact terms of the contract made by the company with the holders of the preferred stock are set out in the following certificate:

"No. 186. 100 Shares.

"Texas Consolidated Compress & Manufacturing Association.

"This is to certify that Charles Storrow is the owner of one hundred shares preferred stock, of the par value of one hundred dollars each, in the capital stock in the Texas Consolidated Compress & Manufacturing Association, transferable only on the books of the association in person, or by attorney on surrender of this certificate.

"This certificate is entitled to a guarantied dividend of six per centum per annum on the number of shares hereby represented, to be paid only out of the net earnings of said association, payable annually on the first day of June of each year; and until such dividends, if any, are paid, no dividend shall be declared on the common stock of this association; but this certificate is not entitled to, nor shall it, participate in any dividends over and above said guarantied dividends as above stated, nor is it entitled to vote at any stockholders' meeting. The directors of this association shall, at their annual meeting in each year, ascertain the net profits from the business of said association, and shall then and there declare such guarantied dividend of six per cent.

"All insurance policies upon property belonging to this association shall be held in trust by said association for the benefit of the holders of these certificates; and in the event of the dissolution of said association, either by limitation or otherwise, the holders of preferred shares shall be entitled to be paid in full prior to any participation in the assets of this association by other stockholders. The company reserves the right to issue, in lieu thereof, first mortgage bonds, bearing interest at the rate of six per centum per annum, and secured by mortgage upon all the compresses of this association.

"Tyler, Texas, June 24, 1893. Jno. M. Duncan, President.

"[Seal.] J. D. Moody, Secretary."

Article 7, §§ 2 and 3, above referred to, are as follows:

"Sec. 2. Not exceeding $50,000 in six per cent. bonds or preferred stock, bearing six per cent. interest, or entitled to six per. cent. dividend, and $100,000 in common stock, shall be issued on each compress that may be owned and brought into this association. Such preferred stock shall be entitled to six per cent. dividend or interest, and shall not be entitled to vote.

"Sec. 3. On the issuance of any bonds by this association, the association shall put aside, of the earnings of the association, 2 per cent. annually, as a sinking fund to liquidate the bonds thus issued, before any dividend is declared on the common stock."

Complainant further alleges, upon information and belief, and so charges the fact to be, that it was the intention of the parties who originally organized said defendant corporation, and all of the stockholders and directors of said corporation at the time of the issuance of said preferred stock, that, in a reasonably short time after the issuance thereof, said preferred stock should be converted into and substituted by first mortgage bonds of the same amount as the said stock, and bearing the same rate of interest per annum as is provided that the said stock shall bear, and that the first mortgage bonds should be secured by a mortgage upon all of said seven compresses then and

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there owned by the defendant association, as aforesaid; that, at the time complainant and others acquired said stock, it was known and generally understood, and complainant verily believed it to be the plan and purpose of said defendant association, and of all its officers, directors, and stockholders, to substitute said stock with first mortgage bonds of said association, as aforesaid, and that said preferred stock should be considered as, and be in effect, the same as first mortgage bonds of said association, and the holders thereof considered as creditors of said association to the extent of such preferred stock as should be held and owned by them; that the complainant was induced to acquire said preferred stock upon the statement and representation of J. H. Brown, who was the president, and John A. Brown, who was the secretary, of said association, that said stock was in effect a first mortgage bond, and would be converted into the form of a first mortgage bond at an early date. Complainants claim a lien upon the net profits of the said association which may have been received upon any of its property, and upon any property or betterments that may have been acquired by the net profits from the business. They further allege that sufficient net profit to pay the dividends due them on the preferred stock was earned during the years of 1892, 1893, 1894, 1895, and 1896, but that no such dividend was declared during said years, and that said association has wrongfully and willfully diverted the said net profits in divers ways, for the purpose of depriving complainants of their dividends, and for the purpose of depreciating and destroying the value of the preferred stock, so the owners of the majority of the common stock might purchase it at a nominal price. They allege a scheme on the part of the holders of the majority of the common stock to wreck the corporation; that judgments for large amounts were being obtained against the company, and large losses had occurred by the deposit in First National Bank of Tyler, which subsequently failed; that the attorney for the bank was the president of the defendant; and that the president of the bank was the general manager of the company, and that they so kept the funds of the company knowing the condition of the bank; that on May 4, 1897, a committee was appointed to prepare a plan for liquidating and winding up the affairs of the association, which reported the debts of the association to be $50,000, preferred stock outstanding $310,000, and the entire compresses owned by the association were worth $240,000. A committee was appointed to sell the property. The facts disclosed in said meeting were that the assets were of far less value than when the association commenced business, and that it is deeply in debt, and cannot pay its debts in due course of business; that the corporation cannot be operated as a going concern with any profit, and ought to be disintegrated, and the assets divided; that the association loaned its credit to the First National Bank of Tyler for $15,000, and sold the compress at Gatesville for $15,000, without authority; that the association has refused to take any action for the protection of the preferred stockholders, and its directors deny that said stockholders are entitled to any relief; that the complainant has demanded of the defendant that the dividends to which he is entitled be declared and paid, which demand has been refused.

The bill concludes with a prayer for a receiver, and an accounting and marshaling of the assets; that the rights of all creditors be ascertained, and the rank in which they are to be paid adjudged; for a decree compelling the directors to declare a dividend; that the preferred stockholders be declared to have a lien upon the net earnings which should have been paid to them, or upon the plant and properties purchased therewith prior to the lien of all others; that the stock be adjudged to be a first mortgage bond in effect, etc.; for an injunction prohibiting the defendant from taking any step or doing any act or thing that may affect the right of the complainant pending the litigation, or which may interfere with the enforcement of such decree as may be rendered; that complainant's lien be foreclosed, the property sold, cost paid, and the balance of proceeds applied to the indebtedness of the defendant according to its rank, as adjudged by the court.

Defendant's demurrers to the "aid bills" and amended bill are as follows: "This defendant, by protestation, not confessing nor acknowledging any of the matters or things in said bills of complaint contained to be true in such

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manner and form as the same therein set forth and alleged, doth demur to the said bills, and, for causes of demurrer, showeth: (1) That it appeareth by each complainant's own showing by each of said bills that he is not entitled to the relief prayed for by the bills against the defendant. (2) That there is no equity in the bills, and that it appears from the face thereof that, if the complainant be entitled to any relief, they have a full and adequate remedy at law. (3) That it appears by the bill that the complainants are not, nor either of them, creditors of the defendant, and have no lien upon the property of defendant. (4) That plaintiff's suits are, in effect, to dissolve defendant corporation, and to distribute its assets, of which proceeding a court of equity hath no jurisdiction. (5) That there are in the bills no facts set forth showing insolvency of defendant, but merely a naked averment of insolvency. (6) That it is not shown by said bills, nor either of them, that the defendant corporation is dissolved, nor that there exists any cause for its dissolution. (7) That complainants do not show that they have no remedy, through the corporation itself, for the alleged injuries complained of. (8) That complainants do not allege demand on the corporation or its officers for the declaration of a dividend, nor demand for the payment of the dividends alleged to be due. (9) That the complainants do not show that they are those for whose benefit they sue, did not assent to, or that they protested against, any of the acts or omissions of which they complain. (10) That the bill shows that, if complainants ever had any cause for action against the defendant, the same is barred by their own laches. (11) That while the bills charge, in terms, fraud and bad faith, they set out no facts or circumstances showing the same, but and only warranted transactions, innocent in themselves, and arising from the exercise of that discretion and judgment committed to the directory by defendant's charter, by-laws, and by the laws of the land. (12) That while said bills charge a combination or conspiracy between H. H. Rowland and J. D. Moody, two of defendant's stockholders, to depress the value of its stock, the same does not show how, in any way, the corporation is responsible for their motives or actions, or how said Moody and Rowland 'dictated' and 'controlled' the action of the defendant corporation, in any other way than by voting stock which they were legally entitled to vote. (13) That paragraph 14 of said original bill insufficiently charges a scheme by said Rowland and Moody to acquire a majority of the common stock of defendant corporation, without alleging any of the facts or circumstances constituting said scheme, or that they acquired a majority of said stock in any other way than fairly and legally. (14) That such of the allegations of paragraph 14 of the original bill as are introduced by the words 'alleges upon information and belief,' and by the words 'is informed,' without charging such allegations to be true, are insufficient. (15) That the said bills undertake to vary or rather to substitute by parol the terms of a written instrument, the foundation of the action set out in the bills, to wit, the certificates of preferred stock in defendant corporation, upon which this suit is brought. (16) That neither of said bills contains allegations that the plaintiff was a shareholder in the defendant corporation at the time of the transaction of which he complains, or that his shares had devolved on him since, by operation of law, nor that the suit is not a collusive one to confer upon a court of the United States jurisdiction of a case of which it would not otherwise have cognizance; nor do said bills set forth any effort of either of the plaintiffs to secure such action as they desire on the part of the managing directors or shareholders of defendant. Wherefore, and for divers other good causes of demurrer appearing on said bill, the defendant doth demur thereto. It prays the judgment of this honorable court whether it shall be compelled to make any answer to said bills, and it humbly prays to be hence dismissed, with its reasonable costs in this behalf sustained."

W. S. Herndon and Ben B. Cain, for appellant.
John M. Duncan, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

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SWAYNE, District Judge (after stating the facts). Much of the difficulty arises in this case from the want of a proper understanding of the difference between the common stock and preferred stock, and the respective rights of the holders thereof. Among the rights of the holders of common stock are those of attending and voting at the meetings of the corporation, participation in the election of officers, the formation of by-laws, the participation in the profits and losses, and in the final division of the property upon dissolution. A share of stock has been defined to be a right which its owner has in the management, profits, and ultimate assets of the corporation; but he has no legal title to the profits or property of the corporation until a dividend is declared, and a division made on the dissolution of the corporation. Common stock differs in many ways from what is termed "preferred stock." The owner of the former is entitled to an equal pro rata division of the profits, if there be any, but has no advantage of any other shareholder or class of shareholders of common stock. Preferred stock, on the other hand, generally entitles its owner to dividends out of the net profits before and in preference of the holders of the common stock. Generally, the rights, powers, and privileges of preferred stockholders depend upon the terms upon which it is issued; preferred stock making a multiplicity of forms, according to the desire or ingenuity of the stockholders, and the necessity of the corporation itself. The percentage of preferred stock dividends is always fixed before it is issued. It is a matter of contract, and may be made cumulative, as it was in this case. Every holder of preferred stock, by its terms, was guarantied a dividend of 6 per cent. per annum thereon to be paid out of the net earnings of the association, which are properly the gross receipts, less the expenses of operation, interest on debts, and other liabilities payable first. The rest is the net profits out of which the shareholders of preferred stock should be paid the 6 per cent. dividend. While it was largely a matter of discretion with the board of directors as to what use they would put the profits to, whether to declare a dividend or use them in the business of the company, there is a limit to this discretion; and the courts will not allow the directors to use their powers oppressively by refusing to declare a dividend while the net profits and character of the business clearly warrant it. This rule is applicable not only to the holders of the common stock, but also to the preferred stock, which is entitled, as a matter of right, to have a dividend declared out of the net profits, if it can be shown that the directors did not exercise reasonable discretion in withholding the same. By the final dissolution of the corporation, the holders of the preferred stock would be entitled to receive only the full face value thereof, after which the balance of the property would be equally divided among the common stockholders.

The bill alleges, and the demurrer admits, that, during the time in question, the association had earned sufficient net profits from the operation of the compresses to pay the 6 per cent. dividend on its preferred stock. It also states that the said association wrongfully and willfully diverted the net profits earned by it, and has used and appropriated the same in divers and sundry ways for the purpose of depriving the complainants of their dividends, and of

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destroying the value of the preferred stock; and this was done by the majority of holders of the common stock, in fraud of the rights of complainants. While it has been determined that the claim of the holders of the preferred stock against the corporation is not strictly a debt, but is contingent upon the existence of sufficient net profits to pay it, it is evident that preferred stock is only a security for a loan, upon which a certain and definite interest was to be paid while the corporation existed, and the full amount thereof returned to the lender when it was dissolved, before the holders of the common stock should receive anything. The preferred stockholder has no vote or voice in the management of the corporation. He possessed none of the rights of a common stockholder as such, and about the only difference between him and the ordinary lender of money was that he was not to receive his interest unless there were sufficient net profits to pay the same. Therefore, so far as the face value of the preferred stock is concerned, it is in the nature of a debt against the corporation, and the interest thereon becomes a debt as soon as it can be shown that there were profits wherewith to pay it, and becomes a lien prior to the rights of the holders of common stock upon the net earnings, if there were such, for the amount of the dividend, and can be followed wherever invested by the company. This contention is further maintained by the fact that the company reserved the right to issue, in lieu of the preferred stock, first mortgage bonds, bearing interest at the rate of 6 per cent. per annum, secured by a mortgage upon all the compresses of the association; thus making this loan represented by the preferred stock payable at any time upon the will of the corporation.

The other allegations in complainants' bill in regard to judgments; the insolvency of the corporation; that it could not be operated as a going concern with profit, and ought to be disintegrated, and the assets divided, and that part of the property had been sold without authority; that their right to have a dividend declared on their stock had been neglected and refused; that their right to receive the full face value thereof had been denied by the corporation,—are matters that can only be investigated and determined by a court of equity. The investigations of the amount of the net income, and the proper disposition thereof, the marshaling of assets, the priority of liens, and the foreclosure of same, as well as the prayer for injunction and receiver pendente lite, are proper matters for the consideration of the chancellor, and cannot be proceeded with in a court of law. The case made by the bill, if sustained by proof, would undoubtedly entitle complainants to relief. Therefore the decree dismissing the bill is reversed, and the case remanded, with instructions to grant a rehearing in the case, and proceed as equity may require.

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(87 Fed. 617.)

VANVALKENBERG et al. v. AMERICAN FREEHOLD LAND MORTGAGE CO. OF LONDON, Limited.

(Circuit Court of Appeals, Fifth Circuit. May 10, 1898.)

No. 641.

1. MORTGAGES—UNCERTAINTY—PAROL EVIDENCE.
   Where the only property owned by a mortgagor in a certain quarter section is the portion lying south of a creek, which portion contains about 30 acres, a mortgage describing land as "thirty acres in" said quarter section is not so vague and indefinite as to be incapable of being aided by parol proof.
2. MORTGAGES—UNCERTAINTY—POSSESSION.
   Where land is conveyed by a mortgage, by uncertain terms of description, it is not indispensable to the identification of the land that the mortgagee should have been placed in actual possession.
3. MORTGAGES—UNCERTAINTY—NOTICE.
   Where a mortgage describes land as "thirty acres in" a certain quarter section, it is not necessary that such land should be laid off in the form of a square, one angle of which conforms to the southwest angle of the quarter section; and, where the only land in such quarter section belonging to the mortgagor is 30 acres lying south of a certain creek, the judgment creditors of the mortgagor will be charged, by the record of the mortgage, with notice of the mortgagee's interest in such land.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

R. W. Walker, for appellants.
Milton Holmes, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

McCORMICK, Circuit Judge. On and prior to April 9, 1886, Daniel H. Turner owned a plantation in Madison county, Ala., containing 2,405 acres, embracing certain half sections, quarter sections, and smaller parts of sections, contiguous to each other, aggregating 365 acres. The latter portion embraced what is described as W. ½ of S. W. ¼ of section 33, township 1, range 2 W., 80 acres; S. W. part of the N. W. ¼ of section 33, township 1, range 2 W., 30 acres; 14 acres in N. W. ¼ of section 33, township 1, range 2 W.,—which 124 acres, together with the N. W. ¼ of section 32, township 1, range 2 W., 160 acres, and the E. ½ of the S. E. ¼ of section 32, township 1, range 2 W., 80 acres, and 1 acre in the S. E. part of section 29, township 1, range 2 W., made up the 365 acres, and constituted the tract described as the Mill tract in the plat marked "Exhibit 4," attached to the deposition of Joseph H. Sloss in the record in this case. On the tract thus described as the Mill tract, and on the south bank of Limestone creek, there stood one grist mill and flouring mill, run by water power, in a frame building four stories high, new, and in complete order. On this 2,405 acres the owner, Daniel H. Turner, applied for and obtained a loan of $16,000 from the American Freehold Land Mortgage Company of London, Limited, the appellee. He executed to the appellee his mortgage, bearing date April 9, 1886, on all of the land above referred to, describing a

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part of the land as "thirty (30) acres in the southwest part of the northwest quarter of section thirty-three (33)." This mortgage was duly recorded on April 17, 1886. On July 6, 1891, the land embraced in this mortgage was put to sale according to its terms, and duly purchased by the appellee at and for the sum of $17,600; that being the highest, best, and last bid therefor at the sale. On August 27, 1891, J. Vanvalkenberg & Sons, the appellants, recovered a judgment in the state court of Madison county, Ala., in the sum of $997.85 and costs of suit, which judgment they caused to be duly recorded on the next day, August 28, 1891, in the proper office in Madison county, Ala. They had duly issued executions on their judgment, which were levied from time to time on different property as the property of the defendant in the judgment, but without any sale thereunder until the issuance of an alias execution on the 2d day of August, 1893, which was levied on all of the N. W. ¼ of section 33, township 1, range 2 W., which lies on the south or west side of Limestone creek, all in Madison county, state of Alabama, and levied upon as the property of Daniel H. Turner, under which levy and execution the sheriff did on the 4th day of September, 1893, sell the property last above described to J. Vanvalkenberg & Sons, and executed to them a deed therefor. On April 8, 1895, the appellants brought a suit of ejectment against the appellee in the state court, which was duly removed into the circuit court; and to enjoin the prosecution of which action, and cancel the sheriff's deed as a cloud upon appellee's title, this bill was exhibited. It is shown that by due proceedings in the chancery court of Madison county, Ala., the appellee had procured to be reformed and corrected the description of the land referred to in the mortgage as "thirty (30) acres in the southwest part of the northwest quarter of section thirty-three (33)," so that the description thereof shall read: "All of the northwest quarter of section 33, on the south side of Limestone creek, containing 30 acres, more or less, township 1, range 2 west, being part of the Bayless Mill property; including the mill and appurtenances thereto. * * *" The appellants were not made parties to the equity proceeding for the reformation and correction of the description of this land in the mortgage. They claim that the land in controversy is not embraced in the description, as originally written in the mortgage, and that by the record of their judgment against the mortgagor they obtained a lien upon the land equivalent to the right that would have been acquired by a purchaser for value without notice of the appellee's equity. They also claim that they had a lien by reason of the issuance from term to term and levy of executions under their judgment previous to and up to the time of the sale. They refer to and rely upon section 2894 of the Code of Alabama (1886), as construed by the supreme court of the state in several recent cases, but especially in Winston v. Hodges, 102 Ala. 304–310, 15 South. 528, and the cases therein cited. The view that we have taken of the facts of this case makes it unnecessary for us to review the Alabama decisions, and the various provisions of the Alabama Code, or the other authorities cited by either of the parties.

The appellants assume, and it appears that the appellee impliedly concedes, that the land described as 30 acres in the S. W. part of the

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N. W. ¼ of section 33 embraces only the land contained within a survey beginning at the S. W. corner of the N. W. ¼, and laid off in a square form. Counsel for the appellants insisted in his oral argument that the law so required. He was asked by one of the members of this court: "What law? The statute law of Alabama, or the common law, or any generally recognized law?" He did not refer us to any authority, either in the statutes of Alabama, or other statutes, or course of judicial decision, demanding recognition of his proposition as settled law. With as much care as our limited time permits, we have examined the Alabama Code, and can find no provision therein that supports the proposition so confidently advanced by the appellants' counsel, that the description in the mortgage cannot embrace any land in the S. W. part of the N. W. ¼ of section 33 that does not fall within a square of that area, beginning at the S. W. corner of the N. W. ¼, and having for two of its lines the lines of the quarter section. If there is any general law to that effect, of which we are charged with judicial notice, the members of this court have not actual knowledge of it. We are aware that in some of the states provisions are made for tax sales, which require the offering, when necessary, of land to the bidder who will take the smallest number of acres of the land, and pay the tax and charges due on the whole tract out of which such number of acres is to be taken; and as a necessary part of such regulation the statute in such cases provides how a small number of acres shall be taken out of the larger tract, giving a beginning corner, and the form in which the survey shall be made so as to include the number of acres. We do not find this provision, however, in the Alabama Code. On the contrary, it appears that even in tax sales a special designation of the land to be sold, as far as it is practicable to make it, shall be made by the public officer, and only so much offered for sale as will meet the delinquent taxes, penalties, and charges.

Daniel H. Turner acquired this property from Mary A. Bayless, Arthur H. Bayless, Leona V. Bayless, and Beatrice A. Pearson, joined by her husband, William J. Pearson; she (Beatrice A.) being a daughter of Reuben W. Bayless. The deeds from these grantors to Daniel H. Turner were duly recorded in 1882. They describe the property, so far as it affects this contest, thus: "All of N. W. ¼ south of Limestone creek, S. 33, T. 1, R. 2 west; 30 acres S. part N. W. ¼, S. 33, T. 1, R. 2 west." It clearly appears from the record in this case that there are only about 30 acres of the N. W. ¼ of section 33 on the south side of Limestone creek, and that, therefore, the description in the deed to Daniel H. Turner from the Bayless grantors is not susceptible of any other reasonable construction than that which conveys all of the N. W. ¼ of section 33 on the south side of Limestone creek, containing 30 acres, more or less, in township 1, range 2 W. It is not shown by the record that Daniel H. Turner owned any land in the N. W. ¼ of section 33, except this 30 acres acquired from his Bayless grantors. On the contrary, it affirmatively appears in the exhibits to the depositions that the records of Madison county do not show such ownership of any other portion of this quarter section to have been in Daniel H. Turner at any time. "The

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description of the land involved in this controversy, as given in the mortgage to the appellee, is not so vague and indefinite as to be incapable of being aided by parol evidence of identification, when read in the light of the circumstances surrounding the contracting parties at the time the conveyance was made. Nor would it be necessary that the mortgagee should have been placed in actual possession of the premises; that being only one of the usual, but not indispensable, modes of identifying lands conveyed by uncertain terms of description." This language is taken from the opinion of the court in O'Neal v. Seixas, 85 Ala. 80, 4 South. 745. The description in the mortgage in that case reads, "A lot of land near Florence, north of the fair grounds, containing 35 acres, more or less,"—a description not only very like, but certainly as vague as, the description of the land in question in the appellee's mortgage.

Without considering the question of notice to the appellants, as lis pendens purchasers after the institution of the equity proceeding to reform the mortgage, or the question of notice to them by reason of their attorneys' former connection with the appellee and its litigation in connection with this land, it seems clear to us that the appellants are chargeable with notice of the appellee's right in this land by reason of the record of the mortgage itself. The mortgagor thought he was conveying in mortgage the land on which the grist mill and flouring mill stood. It was his intention to do so. The appellee thought it was receiving a conveyance in mortgage to the land upon which the mill plant stood. The court of chancery has decreed that this property was embraced in the mortgage. The claim of the appellants rests solely, as far as we can discover, upon the assumption that by some fixed law—whose origin, or the evidence of its existence, we have failed to discover—30 acres out of the S. W. part of the N. W. ¼ of section 33 could only be laid off in the form of a square, one angle of which conforms to the S. W. angle of the quarter section. We think the appellants' claim has no support either in law or equity, and therefore the judgment of the circuit court is affirmed.

(87 Fed. 621.)

MILLER v. MORLEY FINISHING MACH. CO.

(Circuit Court of Appeals, First Circuit. April 15, 1898.)

No. 241.

SPECIFIC PERFORMANCE—PRELIMINARY INJUNCTION.

In a suit for specific performance of an alleged contract for the assignment of a large number of patents belonging to defendant, a preliminary injunction, involving the defendant in much inconvenience and possible loss, should not be granted, restraining him from selling or otherwise disposing of a list of patents enumerated as coming within the agreement, where one of the terms of the contract is so indefinite as to make it doubtful whether the court could enforce it, and where it is also doubtful whether some of the patents for which the injunction is sought are embraced within the terms of the contract.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

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This was a bill by the Morley Finishing Machine Company, a corporation organized under the laws of Maine, against Oliver A. Miller, a citizen of Massachusetts, for specific performance of a contract. In the circuit court a preliminary injunction was granted, restraining the defendant from selling, assigning, or transferring certain patents owned by him, and which were alleged to be subject to the agreement sought to be enforced. From this order the defendant has appealed.

The bill contains the following allegation, among others:

(1) The plaintiff company is the owner of a number of United States letters patent covering inventions and improvements in tree feet or boot trees and boot-treeing machines, used by boot and shoe manufacturers in the finishing of boots and shoes, and was organized for the purpose of manufacturing tree feet or boot trees and boot-treeing machines embodying the inventions and improvements covered by said patents or such other patents as it might acquire, and selling or leasing the machines and appliances so manufactured. The defendant, Miller, is the owner of a large number of patents and rights in patents covering other inventions and improvements in the same line as those covered by the plaintiff's patents,—that is to say, in boot and shoe trees or tree feet and boot-treeing machines and devices, to be used in connection therewith, and machinery to be used in the finishing of boots and shoes, and accomplishing the same or similar results as the boot trees and boot-treeing machines covered by the plaintiff's patents,—and for some years past has been, and is now, engaged in manufacturing, in a shop or factory owned by him in said Brockton, boot trees and boot-treeing machines and devices, to be used in connection therewith under his said patents, and in selling or leasing the same; and such boot trees, boot-treeing machines, and devices manufactured by the defendant, Miller, are widely distributed in boot and shoe factories throughout the United States.

The bill then enumerates certain patents as being among those owned by the defendant, Miller. The contract which the bill seeks to enforce related to these patents. It was negotiated in behalf of the complainant by Charles A. Sinclair, one of its directors, and was dated October 9, 1897; being in full as follows:

Memorandum of an agreement made this day, between Mr. O. A. Miller, of Brockton, Mass., and the Morley Finishing Machine Company, by Wm. B. Lewis, of Boston, president of said company, witnesseth as follows: In consideration of one dollar, and other valuable consideration, receipt of which is hereby acknowledged each to the other, the said Miller agrees to turn over and transfer his business in tree feet, tree-feet machinery, all patents, all machines, tools, and fixtures, and everything pertaining to the manufacturing of said machines and said tree feet, to the said Morley Finishing Machine Company or its representatives, and further agrees that he will not engage in any business, during the life of the said Morley Finishing Machine Company's patent, that shall in any way interfere or injure said tree-feet business. In consideration and upon the promise of the said Morley Finishing Machine Company to take the necessary steps immediately to increase the capital stock of their company to three hundred and fifty thousand dollars, the said Miller to receive outright one hundred thousand dollars of this stock, and fifty thousand dollars to be put into the treasury of said Morley Finishing Machine Company. It is understood and agreed that the said Miller, in consideration of his turning over the above-mentioned business, patents, machinery, tools, and fixtures, and everything that pertains to the business excepting his real estate, shall be elected manager of said business for the term of one year, receiving as compensation for his services five thousand dollars, payable in equal quarterly payments. It is further understood and agreed that the Morley Finishing Machine Company shall have the use, for one year from the date of this transfer, of the said real estate, power, and plant, and everything that pertains to the manufacturing of tree feet now used by the said Miller, free of expense to the said Morley Finishing Machine Company during that

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time, or for such less time as said Morley Finishing Company may occupy it. It is agreed by both parties to this agreement that this agreement shall be submitted to Messrs. Fish, Richardson & Storrow, who shall draw up an agreement, which shall be signed by both parties to this agreement, which shall insure the faithful performance of everything outlined in this agreement; and it is further agreed that the agreement and transfer shall go into effect as of November first, eighteen hundred and ninety-seven. Witness our hands and seals, this ninth day of October, eighteen hundred and ninety-seven.

William B. Lewis, President. [Seal.]
Morley Finishing Machine Co.
Oliver A. Miller.

Witnesses:
J. F. Springfield.
Edw. C. Storrow.

On October 11, 1897, Mr. Sinclair addressed the following letter to Mr. Lewis:

Manchester and Lawrence Railroad, Boston, Mass., October 11, 1897.

William Lewis, Esq., President Morley Finishing Machine Company—Dear Sir: Mr. Miller has just been in to see me, and has called my attention to the fact that, in the agreement which we signed for the consolidation of our businesses, we omitted to state the fact that he was to receive cash for his merchandise. This was my understanding, and was what we agreed to do with Mr. Miller. Leaving it out of the signed agreement was an oversight, and it is entirely proper he should have something to show what the understanding is. If you agree with me as to the intention, I will ask you to please indorse on the back of this your approval. I think this will cover the necessity, as Mr. Fish is to draw up an agreement, and can embody this part of the transaction in the agreement which we will all finally sign.

Yours, truly, [Signed] Chas. A. Sinclair.

Indorsed as follows:

My understanding is the same as outlined within, and we will, in the agreement to be drawn by Messrs. Fish, Richardson & Storrow, have it fully set forth.

[Signed] William B. Lewis, President,
Boston, Oct. 11/97. Morley Finishing Machine Company.

The bill, after setting out the agreement of October 9, 1897, and alleging various steps taken on its part by way of performance, proceeded as follows:

And the plaintiff company further avers that the said agreement of October 9, 1897, was submitted, as provided by its terms, to Messrs. Fish, Richardson & Storrow, counsel for the plaintiff company, who have drawn up an agreement, a copy of which is hereto annexed, marked "Exhibit B," which has been duly executed by the plaintiff company, and which by its terms secures the faithful performance by both parties of everything outlined in said agreement of October 9, 1897; and the plaintiff company has tendered said agreement so prepared and so executed by it to the defendant for his signature; and that the defendant has refused to execute the same, or to execute any other proper instrument turning over and transferring his said business, patents, and other property to the plaintiff, as provided in the said agreement of October 9, 1897, and has refused and still refuses to perform or carry out his said agreement in any respect, and has retained said business, patents, and other property for his own use, and has, by the use of said business, patents, and other property, carried on a business of manufacturing, selling, and leasing boot trees and other boot-treeing machinery in competition with the plaintiff with great profit to him, but to what amount the plaintiff is ignorant and cannot learn save by the discovery herein prayed for, and to the great and irreparable damage of the plaintiff, and proposes to continue said wrongful acts. And your orator is informed and believes that the said defendant, contriving to injure the plaintiff, and to place it forever out of the

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power of this plaintiff to secure the performance of said contract, and wholly regardless of his agreement with the plaintiff, is secretly planning to sell the most valuable parts of said business, property, and patents to some person or persons to the plaintiff unknown; and, unless restrained by the order of this honorable court, the said defendant will actually make said sale and transfer, whereby the rights secured to the plaintiff by said agreement will be rendered worthless.

The Exhibit B mentioned in the bill as having been prepared by complainant's counsel for the purpose of carrying the agreement of October 9, 1897, into effect, is here set out in full:

Exhibit B.

This agreement and assignment, made this —— day of ——, A. D. 1897, by and between Oliver A. Miller, of Brockton, Massachusetts, and the Morley Finishing Machine Company, a corporation duly organized under the laws of the state of Maine, hereinafter called the "Morley Company," witnesseth:

That whereas said Miller, by the terms of a certain agreement dated October 9th, 1897, agreed to turn over and transfer to the Morley Company his business in tree feet, tree-feet machinery, all patents, all machines, tools, and fixtures, and everything pertaining to the manufacturing of said machines and said tree feet, excepting his real estate, for the consideration set out in said agreement; and whereas the capital stock of the Morley Company has been increased as provided in said agreement, except that by the agreement of the parties said increase was to five hundred thousand dollars instead of to three hundred and fifty thousand dollars, and the Morley Company has issued and delivers to said Miller simultaneously herewith a certificate for ten thousand shares of its capital stock, of the par value of one hundred thousand dollars, and has in its treasury twenty thousand shares of its capital stock, of the par value of two hundred thousand dollars: Now, therefore, be it known:

(1) That in consideration of the issue and delivery of the said stock to said Miller, and of the covenants and agreements of said Morley Company herein contained, and in further consideration of the sum of one dollar to him paid by the said Morley Company, the receipt whereof is hereby acknowledged, the said Miller does hereby grant, sell, assign, transfer, and deliver unto the said Morley Company his business in tree feet and tree-feet machinery, all machines, tools, and fixtures, and everything pertaining to the manufacture of tree feet and tree-feet machines and to his tree-feet business, except real estate owned by him.

(2) For the consideration aforesaid, said Miller does further sell, assign, transfer, and set over unto the Morley Company the following letters patent of the United States, together with the inventions therein shown and described, viz.: No. 317,476, granted to Abel D. Tyler, Jr., for boot tree, May 5, 1885; No. 319,354, granted to Abel D. Tyler, Jr., assignor to Oliver A. Miller, for boot tree, June 2, 1885; No. 319,355, granted to Abel D. Tyler, Jr., assignor to Oliver A. Miller, for boot tree, June 2, 1885; No. 319,356, granted to Abel D. Tyler, Jr., assignor to Oliver A. Miller, for boot tree, June 2, 1885; No. 347,309, granted to A. R. Wellman, assignor to Oliver A. Miller, for boot tree, August 10, 1886; No. 348,937, granted to Abel D. Tyler, Jr., assignor to Oliver A. Miller, for boot or shoe tree, September 7, 1886; No. 393,003, granted to Alfred B. Fowler, assignor to Oliver A. Miller, for boot-treeing machine, November 20, 1888; No. 395,668, granted to George E. Smith, assignor of one-half to William A. Knipe, for last, January 1, 1889; No. 427,698, granted to Howard G. Locke, assignor of one-half to Brockton Last Co., for boot or shoe tree, May 13, 1890; No. 440,788, granted to Jothan H. Burbank, Lovina J. Burbank, administratrix, assignor to Oliver A. Miller, for boot tree, November 18, 1890; No. 441,115, granted to F. L. Stone and A. R. Wellman, assignors to Oliver A. Miller, for boot or shoe tree, November 18, 1890; No. 441,116, granted to A. R. Wellman, assignor to Oliver A. Miller, for boot tree, November 18, 1890; No. 441,117, granted to A. R. Wellman, assignor to Oliver A. Miller, for boot tree, November 18, 1890; No. 442,033, granted to Alfred B. Fowler, assignor to Oliver A. Miller, for boot-treeing ma-

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chine, December 2, 1890; No. 442,034, granted to Alfred B. Fowler, assignor to Oliver A. Miller, for boot-treeing machine, December 2, 1890; No. 449,877, granted to W. Gordon, assignor of one-half to Oliver A. Miller, for last, April 7, 1891; No. 452,142, granted to Howard G. Locke, William H. Cary, and Joseph E. Kimball, said Locke assignor to Brockton Last Co., for shoe tree, May 12, 1891; No. 500,711, granted to W. Gordon, assignor to O. A. Miller, for last, July 4, 1893; No. 556,096, granted to W. Gordon and C. E. Gordon, for last, March 10, 1896; design No. 26,040, granted to Oliver A. Miller, for ironing tool, September 15, 1896; No. 557,210, granted to H. G. Locke, assignor to O. A. Miller, for last, March 31, 1896; No. 559,492, granted to H. G. Locke, assignor to Brockton Last Co., for last, May 5, 1896; No. 568,326, granted to J. W. Barlow, assignor to O. A. Miller, for last, September 29, 1895.

Said Miller does also, for the consideration aforesaid, hereby sell, assign, transfer, and set over unto the Morley Company all his right, title, and interest in, to, and under any and all other letters patent (and the inventions therein shown and described), whether of the United States or of any foreign country, which pertain to tree feet and tree-feet machinery, especially including the following letters patent of the United States, viz.: No. 342,298, granted to Oliver I. Howe, for boot or shoe tree foot, May 18, 1886; No. 420,501, granted to Clarence A. Sumner, assignor of one-half to Oliver A. Miller, for boot or shoe treeing machine, February 4, 1890. And also the following foreign letters patent, viz.: English letters patent No. 6,709, dated June 2, 1885, to William R. Lake, on communication from O. A. Miller; English letters patent No. 6,710, dated June 2, 1885, to William R. Lake, on communication from O. A. Miller; English letters patent No. 7,974, dated May 22, 1890, to Alfred B. Fowler; English letters patent No. 18,629, dated November 18, 1890, to Henry H. Lake, on communication from O. A. Miller; French letters patent No. 169,302, dated June 2, 1885, to Oliver A. Miller; French letters patent No. 209,964, dated December 3, 1890, to Alfred B. Fowler; German letters patent No. 34,593, dated June 2, 1885, to Oliver A. Miller; German letters patent No. 34,687, dated June 2, 1885, to Oliver A. Miller; German letters patent No. 58,742, dated December 3, 1890, to Alfred B. Fowler; German letters patent No. 59,978, dated November 18, 1890, to Oliver A. Miller.

And said Miller does also, for the consideration aforesaid, hereby sell, assign, transfer, and set over unto the Morley Company all his right, title, and interest in and to any and all applications for letters patent the inventions of which pertain to tree feet and tree-feet machinery, especially including the following applications for letters patent of the United States, viz.: Ser. No. 364,688, filed September 11, 1880, by Howard G. Locke; Ser. No. 453,749, filed December 1, 1892, by Howard G. Locke; application filed by George E. Smith for lasts, assigned to O. A. Miller, July 22, 1895, recorded in United States patent office, Liber T[51], page 416; application filed by George E. Smith, for lasts, assigned to O. A. Miller, October 5, 1896, recorded in United States patent office, Liber O[54], page 269; application filed by Charles H. Saunders, for hinged last, assigned to O. A. Miller, August 14, 1896, recorded in United States patent office, Liber K[54], page 168; application filed by Charles H. Saunders, for lasts, assigned to O. A. Miller, October 7, 1896, recorded in United States patent office, Liber W[54], page 111; application filed by Oliver A. Miller and Don C. Luce, for lasts, said Luce's interest having been assigned to said O. A. Miller, July 3, 1897, recorded in United States patent office, Liber F[56], page 199; application filed by John W. Barlow, for lasts, assigned to O. A. Miller, February 17, 1897, recorded in United States patent office, Liber P[55], page 4; application filed by John W. Barlow, for lasts, assigned to O. A. Miller, February 17, 1897, recorded in United States patent office, Liber P[55], page 4.

Said Miller does hereby authorize and request the commissioner of patents to issue the several letters patent that may be granted on such applications, or any of them, to the said Morley Finishing Machine Company, its successors and assigns. To have and to hold the said goods and chattels, letters patent, applications, and other property to the said Morley Finishing Machine Com-

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pany and its successors and assigns, to its and their own use and behoof forever.

(3) For the consideration aforesaid, said Oliver A. Miller does hereby covenant and agree that he will permit the Morley Company to use and occupy, free of expense to the Morley Company, for one year from November 1, 1897, his factory, power, plant, and everything that pertains to the manufacture of tree feet used by the said Miller on the ninth day of October, A. D. 1897.

(4) For the consideration aforesaid, the said Miller does hereby covenant and agree that he will not engage in any business that shall in any way injure the said tree-feet business assigned and sold by these presents to the Morley Company, until the expiration of the Morley Company's letters patent No. 589,696, dated September 7, 1897.

(5) In consideration of the foregoing transfers and assignments from and agreement of the said Miller, the Morley Company does hereby covenant and agree that said Miller shall be elected manager of its business for the term of one year from the first day of November, 1897, and that it will pay to said Miller for said period of one year a salary of five thousand dollars in equal quarterly payments, the first payment to be made February 1, 1898.

(6) This instrument shall take effect as of the close of business on the thirty-first day of October, A. D. 1897.

In witness whereof, the said Oliver A. Miller has hereunto set his hand and affixed his seal, and the said Morley Finishing Machine Company has caused this instrument to be signed and its corporate seal to be hereunto affixed by Wm. B. Lewis, its president, and John F. Springfield, its treasurer, thereunto duly authorized, in duplicate, the day and year first above written.

Morley Finishing Machine Company,
[Corporate Seal.] By William B. Lewis, President,
John F. Springfield, Treasurer.

The restraining order (which by a subsequent order of the court became a preliminary injunction) was in part as follows:

We therefore, in consideration thereof, enjoin and command you, each and every of you, that from and immediately after the receipt and notice of this, our writ, by you, or any of you, you shall not sell, assign, transfer, or incumber, or otherwise intermeddle with the title to any of the business and property used therein, and patents and patent rights subject of the contract between you and the said Morley Finishing Machine Company of October 9, 1897, and particularly shall not withdraw any money from said business, nor sell, assign, transfer, incumber, or otherwise intermeddle with the title to any of the following described patents and inventions, or the rights therein: [Then followed a long list of patents and pending applications for patents.]

William Quinby, for appellant.

Frederick P. Fish and Robert F. Herrick, for appellee.

Before PUTNAM, Circuit Judge, and BROWN and LOWELL, District Judges.

PER CURIAM. With reference to the letter of Mr. Sinclair, which it is admitted must be read into the alleged agreement which the plaintiff seeks to enforce, it appears to the court that the expression "cash for his merchandise" is so indefinite as to leave the alleged agreement so vague that it is doubtful whether an equity court can compel its enforcement; and, moreover, it is doubtful whether the instrument of conveyance submitted to the defendant for execution by him contained a proper offer to carry out the draft contract as it was supplemented by that letter; and, further, it appears very doubtful whether the alleged agreement covers the patents relating to hinged lasts, in reference to which an apparently fair controversy has

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arisen between the parties. On the whole, the court is of the opinion that the case, as presented, is so doubtful on the merits that an injunction of the broad character granted below, involving the defendant in so much inconvenience and possible loss, ought not, in this case, to be affirmed. The order appealed from is reversed, and the costs of this court are awarded to the appellant.

(87 Fed. 626.)

RICE et al. v. P. J. WILLIS & BRO.[1]

P. J. WILLIS & BRO. v. OAKES et al.

(Circuit Court of Appeals, Fifth Circuit. May 10, 1898.)

No. 671.

1. ADVERSE POSSESSION—COLOR OF TITLE.
"Title," as used in the Texas statute prescribing the three-years limitation, means a regular chain of transfer from or under the sovereignty of the soil; and "color of title" means a consecutive chain transfer down to the person in possession, without, however, being regular; as where one of the memorials or muniments is not registered or duly registered, or is only in writing, or such like defects as do not include a want of intrinsic fairness and honesty.

2. VENDOR AND VENDEE—BONA FIDE PURCHASER—DESTROYED RECORDS.
A bona fide purchaser for value, without notice, of a tract of land, part of which has been conveyed to another by a deed the record whereof has been destroyed, and not replaced as provided by the statute, acquires a good title; but where, on subsequently receiving notice the prior deed, he sells the land, and conveys it by a deed of special warranty, containing a reservation of the part conveyed by such previous deed, thus showing his waiver of previous notice, this protects the title of the grantees under the previous deed, so that his executors would have no power over the part conveyed by it.

Error and Cross Error to the Circuit Court of the United States for the Northern District of Texas.

John C. Winter, Pressley K. Ewing, and H. F. Ring, for plaintiffs in error Rice, House, and Oliver.

Eugene Williams, for P. J. Willis & Bro.

D. A. Kelley, for defendant in error R. A. Oakes.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

McCORMICK, Circuit Judge. This is a Texas real action to try the title to a tract of land described in the pleadings. The parties, by stipulation in writing, waived a jury, and submitted the case, on law and fact, to the decision of the judge. Reducing the finding of facts to working form, it shows that one Louis Moore was the common source of title through and under whom all the parties claim; that on February 1, 1875, Louis Moore conveyed to one E. H. Graham, trustee, the north half of the Morgan league, including the land in controversy, to secure a debt specified in the conveyance; that this

[1] Petition for rehearing filed May 23d, and denied June 2d, without opinion.

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trust deed was duly foreclosed, and the land sold according to the terms of the deed, at which sale, on September 8, 1881, one R. S. Willis became the purchaser; that, prior to the making of the trust deed, Louis Moore had deeded the land in controversy to A. Groesbeck, W. J. Hutchins, and W. R. Walker, trustees, by deed dated August 24, 1872, and duly recorded September 6, 1872; that the trustees named took for the benefit of the Houston & Texas Central Railway Company, and the trustees, parties to this suit, are the successors to the grantees in this deed; that the book in which the record was made was destroyed by fire on October 12, 1872, and the deed was re-recorded on June 13, 1893; that Willis had no notice of this conveyance at the time he purchased the north half of the Morgan league; that he was a purchaser for value, in good faith, and his purchase vested in him the title to the land in controversy; that on February 9, 1884, Willis executed and delivered to R. A. Oakes, for an adequate consideration, a deed to a part of the Morgan league, reciting in the deed that "this conveyance includes the north half of said league, less a certain portion sold to the Central Railway Company, lying at or near Perry Station"; that the land mentioned in and reserved out of this conveyance by R. S. Willis to R. A. Oakes, under which conveyance Oakes claims title to the land in controversy, is the land that was conveyed by Louis Moore to Baker, Rice, Hutchins, and Groesbeck, trustees (whose title the defendants House, Rice, and Oliver hold), by deed of date August 24, 1872; that this last-named deed was duly recorded in Book K of the Records of Deeds of Falls County, in which county the land is situated, on September 6, 1872; that the land so conveyed by the deed last named was surveyed and marked by a civil engineer for the railway company and said trustees in the year 1872, together with one Gill, agent for Moore; that, when Oakes was about to purchase the land from Willis, he demanded a general warranty deed from Willis, which demand was refused, and Willis conveyed to Oakes by deed with special warranty against claims thereto arising by, under, or through him; that the deed of Willis to Oakes conveyed the north half of the Morgan league, less a certain portion sold to the Central Railway Company, lying at or near Perry Station, and was so expressed on the face of the deed; "that the tract so excepted is the land conveyed by Louis Moore, but it is not found that Willis meant this tract in making the reservation in his said deed." The last clause of the finding just quoted, to the effect that it is not found that Willis meant this tract in making the reservation in his said deed, would be somewhat confusing if the fact had not been so distinctly found that the land in controversy conveyed by Louis Moore to the trustees Baker, Rice, Hutchins, and Groesbeck is the land so excepted out of Willis' deed for the north half of the Morgan league to Oakes. That being the fact clearly found, the deed itself best shows what Willis meant in making the reservation. R. S. Willis died in 1892, leaving a will, which was duly probated, and in which he named executors, and clothed them with ample powers for independent action; and the executors named, having accepted the trust, and having duly qualified as such executors,

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conveyed the land in controversy to P. J. Willis & Bro. (incorporated), the plaintiff below, and plaintiff in error here.

The trial judge states as conclusion of law:

"(1) The plaintiff is not entitled to recover against either of the defendants, trustees, or the defendant Oakes. If, upon any conceivable theory, the plaintiff has any claim whatever to the land in controversy, such claim is barred as to the defendant Oakes by the three and five years' statutes of limitation.

"(2) As between the defendants, trustees, F. A. Rice, T. W. House, and W. C. Oliver, on the one hand, and the defendant Oakes on the other, the trustees are not entitled to recover against Oakes. Oakes is not an innocent purchaser for value, without notice as to the trustees, if such defense be available in an action at law. But, in the judgment of the court, the proof plainly shows that as to Oakes the claim of said trustees, defendants, is barred by the three and five years' statutes of limitation.

"(3) Judgment will be rendered that the plaintiff take nothing by its suit as against the said trustees, defendants, and the said defendant Oakes, and that, as to such defendants, the costs be adjudged against the plaintiff."

By the term "title," as used in the statutes of Texas prescribing what is called the "three-years limitation," is meant a regular chain of transfer from or under the sovereignty of the soil; and by "color of title" is meant a consecutive chain of such transfer down to such person in possession, without being regular, as if one of the memorials or muniments be not registered or not duly registered, or be only in writing or such like defect as may not extend to or include the want of intrinsic fairness and honesty. To support the five-years limitation, the party setting it up is required to show that he is claiming under a deed or deeds duly registered. Rev. St. Tex. 1895, arts. 3341, 3342.

As the land in controversy was excepted out of Willis' conveyance, covering all the other part of the north half of the Morgan league to Oakes, he was not able to show, and did not show, either title or color of title or deed of any kind to the land in controversy, and therefore did not make out either his plea of three years' or of five years' limitation. We concur with the judge of the circuit court in holding that the corporation, P. J. Willis & Bro., claiming under and through the executors of R. S. Willis, cannot recover the land in controversy, because, while it appears from the findings of fact that the title to it did vest in R. S. Willis at the time of his purchase, in 1881, by reason of the fact that he became a purchaser of the whole half league for value, without any actual or constructive notice of the prior conveyance, his recitation in the deed to Oakes shows that, having subsequently received such notice, he put on the face of his special warranty deed to his vendee a reservation which protected the title of the trustees F. A. Rice, T. W. House, and W. C. Oliver, and put it beyond the power of his executors to convey any title thereto to the plaintiff below, the plaintiff in error herein. There being, therefore, no title remaining in the estate of R. S. Willis which his executors could convey to the corporation, P. J. Willis & Bro., and hence no title in that corporation, and there being no right, legal or equitable, in Oakes to the land in controversy, and no support whatever to his plea of three and five years' statute of limitation, by reason of this lack of any deed thereto, and the land

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having been, in good faith and for an adequate consideration, conveyed by Louis Moore, the common source of title, to the predecessors in the trust of the trustees F. A. Rice, T. W. House, and W. C. Oliver, the title has continued to be in the trustees for the benefit of the Houston & Texas Central Railway Company, and remains theirs in law and in equity.

We conclude, therefore, that the judgment of the circuit court is not supported by the findings, and that the findings require that the judgment should be rendered in favor of the trustees F. A. Rice, T. W. House, and W. C. Oliver. It is therefore ordered that the judgment of the circuit court is reversed, and is now here reformed and rendered so as to vest the title to the land in controversy in the defendants, trustees, F. A. Rice, T. W. House, and W. C. Oliver.

(87 Fed. 420.)

CHAMBERLAIN v. PIERSON.

(Circuit Court of Appeals, Fourth Circuit. May 17, 1898.)

No. 226.

1. ACTION FOR INJURIES RECEIVED IN WRECK—RECORD OF CONVICTION OF WRECKERS—ADMISSIBILITY OF EVIDENCE.

   In an action against a railroad company to recover for injuries received in a wreck caused by the derailment of a train through the alleged negligence of the company, the record of the trial and conviction of persons charged with murder by feloniously derailing the train is not admissible in evidence on behalf of the defendant.

2. CONTRACT FOR TRANSPORTATION OF EMPLOYES—EFFECT ON RIGHTS OF EMPLOYES.

   Employés of an express company, who had no knowledge of a contract between such company and a railroad company to the effect that such employés were to be furnished free transportation over the railroad at their own risk while in the service of the express company, are not bound thereby.

3. LICENSEE ON RAILROAD TRAINS—RIGHT TO RECOVER FOR NEGLIGENCE.

   One who accepts free transportation on a railroad at his own risk can nevertheless recover for injuries caused by negligence of the railroad company or its employés, not his fellow servants.[1]

In Error to the Circuit Court of the United States for the District of South Carolina.

J. E. Burke, for plaintiff in error.

W. Perry Murphy, for defendant in error.

Before GOFF, Circuit Judge, and JACKSON and PAUL, District Judges.

PAUL, District Judge. This was an action brought by the defendant in error against the plaintiff in error for damages resulting to the defendant in error while traveling as an express messenger on the railroad of which the plaintiff in error was receiver. The complaint filed in the court below alleges:

"That on the 28th day of November, 1891, the said plaintiff was in the employ of the Southern Express Company as messenger, and in such capacity

[1] See note at end of case.

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was on board of the train of the South Carolina Railway Company, operated by the defendant as aforesaid, which left the city of Columbia about the hour of 7:50 o'clock on the said 28th of November, 1891, and was on said train when, through the carelessness, negligence, wrongful act, and default of said Chamberlain as receiver as aforesaid, he sustained serious injuries," etc. "That the said carelessness, negligence, wrongful act, and default of the said defendant lay in the fact that he so carelessly, negligently, and wrongfully conducted himself in the management of said railroad that, through the negligence, carelessness, and unskillfulness of himself and his servants, certain bolts were left out in the rails on the roadbed of the said company near the nineteen-mile post, near Lincolnville, S. C., by reason of which the train upon which plaintiff was riding did on said 28th day of November, 1891, without any fault on the part of the plaintiff, become derailed and wrecked at or near the said nineteen-mile post, in the county of Berkeley, in the state of South Carolina, inflicting the injuries upon the plaintiff above mentioned, from which injuries the said plaintiff has both suffered great bodily pain and been deprived of the means of future support, to his great loss and damage, to wit: * * *."

The amended answer of the defendant to the complaint is as follows:

"First. For a first defense, that he denies each and every allegation in said complaint contained. Second. And for a second defense this defendant says that the derailment referred to in the third paragraph of the complaint did not occur through the negligence of this defendant or his servants, but through the unforeseen and unexpected act of certain malicious and ill-disposed persons, whose names this defendant is informed and believes are Peter Bruno, alias Dick Bruno, and Grant Bennett, in removing bolts and fastenings of the rails at the place where said derailment occurred, without the knowledge of this defendant or any of his servants, and notwithstanding due care and diligence on the part of this defendant in the operation and maintenance and inspection of said railway. Third. And for a third defense this defendant says that said plaintiff was permitted to enter upon and into the car of this defendant only as the agent and servant of this defendant, and was given free transportation upon the car of this defendant only on condition that, in so transporting the said plaintiff, said plaintiff should be at his own risk of loss or damage through personal injury received during such transportation."

The record shows that on the trial of the case the defendant, to sustain the second ground of defense stated in his answer—

"Offered in evidence an exemplification of the record of the court of general sessions, Berkeley county, state of South Carolina, duly authenticated, in the case of State of South Carolina v. Peter Bruno and Grant Bennett, showing the indictment, final conviction, and sentence of said Peter Bruno and Grant Bennett on the charge of murder of said Mason Parker on 28th November, 1891, near Lapson's, in Berkeley county, S. C., by feloniously breaking, injuring, removing, and destroying certain joints, plates, and bolts from the railway track of the South Carolina Railway Company, by reason of which a certain railway train was derailed and thrown from said track, and whereby the said Mason Parker was crushed, and received a mortal wound, of which mortal wound the said Mason Parker died; and thereupon plaintiff objected to the introduction of the same on the ground that the evidence was irrelevant, and as being res inter alios acta, when his honor, the presiding judge, sustained the objection, and excluded the testimony. To all of which the defendant then and there, and before the jury had withdrawn from the bar, did except, and the court noted the exception."

An exception to this ruling of the trial judge is the basis of the first assignment of error.

An agreement between the defendant railway company, of the first part, and the Southern Express Company, of the second part, was also introduced by the defendant. So much of that agreement as appears to be relevant to the issues is stated in the record as follows:

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"That whereas, the party of the first part desires that all express business conducted on and over its lines, as they now or hereafter may exist, shall be under the sole control and direction of the party of the second part, for the mutual benefit and account of the parties hereto, the revenue from which shall be apportioned as hereinafter defined and agreed; and whereas, the aim and object of this agreement is to promote mutual interests, and secure for the parties hereto the best obtainable results therefrom, each will co-operate fully with the other for the attainment of that end: Now, therefore, it is hereby agreed as follows: * * * Eighth. The said party of the first part hereby recognizes as its employés all officers, agents, and servants of the party of the second part, while engaged in the business contemplated by the agreement, and will accord free transportation for them at their own risk. Ninth. Employés of the party of the second part shall be subject to the rules of the party of the first part, made for the government of its employés while on the trains; but said rules shall not conflict with the proper duties of said employés, or unnecessarily interfere with them in the discharge of their duties. * * * Fourteenth. No responsibility shall attach to the party of the first part for any goods, money, or other articles that may be transported on or over its lines, for or in the custody of the party of the second part, except for losses of or damage to freights which may result from the neglect of the party of the first part, its agents or servants; provided, that no such responsibility shall attach to the party of the first part for freight or other matter on which the party of the first part receives no compensation."

At the conclusion of the evidence the court instructed the jury as follows:

"It is not necessary to decide whether the plaintiff, as messenger of the express company, had all the rights of a passenger on this train, or whether he was bound by the terms of the contract between the two companies, although he did not know of the contract, or whether he stood in the place of an employé of the railroad company. I charge you that if he was injured in this train by reason, perchance, of the negligence of the boss track minder and his gang, the railroad company is responsible to him, whether he was a passenger, or bound by the contract between the two companies, or was an employé of the railroad company. The boss track minder and his gang were not fellow servants of the plaintiff, if we treat him as an employé of the railroad company; and their negligence was not one of the risks he assumed, if he assumed any risks."

To this instruction the defendant excepted, and this is made the second and third grounds of assignments of error.

The fourth assignment of error is that the court erred in—

"Instructing the jury that in this case there was no burden of proof on either side, but the jury should come to their conclusion from all the facts and circumstances of the case. That the court erred in said instruction, inasmuch as, notwithstanding the granting of the first request to charge, this instruction impaired the force and meaning thereof, and was calculated to mislead the jury."

The instruction on which this assignment of error is based is shown by the record as follows:

"His honor, the presiding judge, further instructed the jury that in this case there was no burden of proof on either side, but that the jury should come to their conclusion from all the facts and circumstances in the case. To which instructions the defendant there and then, before the jury had withdrawn from the bar, excepted, and the court noted the exception."

In settling this bill of exceptions, the judge states that he has no doubt some such expression was used; that what he meant was that, both parties having offered proof as to the disputed facts, the question was as to the preponderance of evidence,—the burden having been accepted, and the evidence being intended to remove it. As

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he had not refused the first request to charge by defendant, he did not feel that he was misleading the jury. This first request was as follows:

"(1) That the foundation of the action is negligence, and the plaintiff, Pierson, cannot recover from the defendant unless plaintiff proves, by the preponderance of the evidence, that the defendant has been guilty of negligence; that is to say, that, under the circumstances proved in this case, he has omitted to do what a prudently conducted railroad company would have done, or that he has done what a prudently conducted railroad company would not have done."

The record does not show that the instruction here complained of was given in the usual form, which is in writing, and in which it is apparent the other instructions were given. The record shows that the verdict of the jury was rendered more than 12 months before the bill of exceptions was settled, and the indefinite and uncertain character of this instruction is shown by the language of the presiding judge, that he has "no doubt some such expression was used," and states what he meant by it. If we apply with strictness rule 11 of this court, such an indefinite statement of the instruction should be rejected. The rule provides:

"When the error alleged is to the charge of the court, the assignment of error shall set out the part referred to totidem verbis, whether it be in instructions given or instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned." 21 C. C. A. cxii., 78 Fed. cxii.

But there is no real necessity for discussing this assignment of error, in view of the first instruction asked by the defendant and given by the court. If true, as the trial judge says, "no doubt some such expression was used," which counsel for the defendant insists was an instruction to the jury, and calculated to mislead it, the law is so clearly and correctly stated in the first instruction asked by the defendant and given by the court, and so completely covers the principle involved, that the jury could not have been misled as to the law. If there was error in the verbal, and, as appears to us, uncertain, expression of the court, to which exception is taken, it was corrected by the written instruction. This written instruction negatives the contention that the court erred in making a statement calculated to mislead the jury.

The fifth, sixth, and seventh assignments of error are based on the following instructions requested by the defendant, which the court refused to give as asked for, but gave as qualified by the court:

"The defendant further requested his honor, the presiding judge, to charge the jury as follows: 'That if the jury find from the evidence that the plaintiff was an express messenger on defendant's train, under a contract which was made between the express company, of which the said plaintiff was an agent, and the defendant, which provided that the plaintiff should be considered as an employé, officer, agent, or servant of the defendant, Chamberlain, and should be accorded free transportation at his own risk, then plaintiff cannot recover from defendant, and the jury must find for the defendant,' —which request his honor declined to give. except with this qualification, 'Unless the injury was caused by the negligence of an agent of defendant who

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was not a fellow servant of plaintiff,' to which refusal the defendant then and there, and before the jury had withdrawn from the bar, did except, and the court noted the exception. The defendant further requested his honor, the presiding judge, to charge the jury as follows: 'That, as between employer and employé, negligence on the part of the employer is not to be inferred from the existence or occurrence of the accident which caused the injury complained of,'—which request his honor declined to give, to which refusal the defendant then and there, and before the jury had withdrawn from the bar, did except, and the court noted the exception. The defendant further requested his honor, the presiding judge, to charge the jury as follows: 'That an employer does not become an insurer of the life or safety of his employés, but the duty of the employer to the employé is to furnish and keep the machinery and appliances about which the employé is required to perform his work in a reasonably safe condition.'—which request his honor declined to give, to which refusal defendant excepted."

The action of the court in refusing to admit in evidence on behalf of the defendant the record of the conviction of Bruno and Bennett in the court of general sessions of Berkeley county, S. C., for the murder of Parker by removing and destroying the plates and bolts of the railroad company, was clearly correct. It was properly rejected as being res inter alios acta. This principle is so familiar and fixed in the law of evidence as to scarcely demand discussion. A few citations of authorities will be sufficient to show the correctness of the ruling of the court below. The plaintiff in the circuit court was not a party to, or interested in, the prosecution and conviction of Bruno and Bennett, and could not be bound or in any wise affected by the evidence or judgment in that case. The general doctrine on this subject is thus stated in 2 Black, Judgm. § 529:

"Since the parties to a criminal prosecution and those in a civil suit are necessarily different, and as the objects and results of the two proceedings, and the rules of evidence which apply to them, respectively, are equally diverse, it follows that the judgment in the former cannot be used by way of estoppel in the latter, save for the single purpose of proving its own existence, if that becomes a relevant fact."

In Wood v. Davis, 7 Cranch, 271, the supreme court held that the record of a judgment that a woman was born free was not conclusive evidence of the freedom of her children, in a suit by them against one not a party or privy to the defense in the mother's action. In an action of trespass by a marine in an exploring expedition, against the commander, for causing him to be whipped, the proceedings of a court-martial, acquitting the commander of the charge, were held not admissible in evidence. Wilkes v. Dinsman, 7 How. 89.

The second, third, fifth, sixth, and seventh assignments of error will be considered together. They are all made on the theory that Pierson, the plaintiff in the court below, was bound by the contract between the railroad company and the express company; that he was on the railroad train by virtue of that contract; that by said contract he was regarded as an employé of the defendant, the railroad company; and that by said contract he was accorded free transportation at his own risk. The position taken by counsel for the railroad company, and insisted upon in the instructions asked on behalf of the company, was that the plaintiff was not entitled to recover, even though the evidence showed that the injury which he suffered was caused by the negligence of an agent of the defendant

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who was not a fellow servant of the plaintiff. The learned judge of the trial court held (what we regard as a correct announcement of the law) that, if the plaintiff was injured by reason of the negligence of the boss track minder and his gang, the railroad company was responsible to him, whether he was regarded as a passenger, or was bound by the contract between the two companies, or was an employé of the railroad company; that the boss track minder and his gang were not fellow servants of the plaintiff, if he was to be treated as an employé of the railroad company; and that their negligence was not one of the risks he assumed, if he assumed any risks. The discussion of this feature of the case presents the question: Was the plaintiff below, as a messenger of the express company, bound by the contract between the railroad company and the express company to assume all risks to life and limb to which he was exposed in performing his duties on the train, as an express messenger? He was not a party to the contract, never ratified it, and in his testimony, when asked if he knew of this provision of the contract, "'that the said parties of the first part hereby recognize as its employés all officers, agents, and servants of the second part,' etc., and you were accorded free transportation at your own risk?" answered, "If I had known that, I wouldn't have gone." The authorities cited by defendant's counsel to sustain the contention that the plaintiff was bound by the contract between the railroad and the express company are based on the theory that the party affected by the contract had knowledge of its provisions, and acquiesced in its terms. Wiggins Ferry Co. v. Ohio & M. Ry. Co., 142 U. S. 396, 12 Sup. Ct. 188; 2 Pom. Eq. Jur. § 965. The view of the trial judge was that notwithstanding the plaintiff, under the contract between the railroad company and the express company, should be considered an employé of the railroad company, and accorded free transportation at his own risk, yet the railroad company was liable if the injury to the plaintiff was caused by the negligence of an agent of the defendant who was not a fellow servant of the plaintiff. That the plaintiff, an express messenger, was not a fellow servant of the track minder and those under him, is not questioned. If it be conceded, as claimed by the railroad company, that the contract between it and the express company accorded the plaintiff free transportation at his own risk, yet it is well established that such a contract will not relieve the railroad from responsibility for an injury resulting from the negligence of its agents. One of the earliest decisions of the supreme court on this question is Railroad Co. v. Derby, 14 How. 468. In this case the plaintiff below was president of another company, and a stockholder in the road on which he was riding. He was on the road by invitation of the president of the company,—not in the usual passenger cars, but on a small locomotive car used for the convenience of the officers of the company,—and paid no fare for his transportation. The railroad company defended on the ground that no cause of action can arise to any person by reason of the occurrence of an unintentional injury while he is receiving acts of kindness which spring from mere social relations, and as there was no contract between the parties, express or implied, the law

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would raise no duty as between them, for the neglect of which an action can be sustained. The supreme court said:

"The liability of the defendants below for the negligent and injurious act of their servant is not necessarily founded on any contract or privity between parties, nor affected by any social relation, or otherwise, which they bore to each other."

Railroad Co. v. Lockwood, 17 Wall. 357, is a leading case on this subject. The court there held:

"(1) That a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just in the eye of the law. (2) That it is not just and reasonable, in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants. (3) That these rules apply both to carriers of goods and carriers of passengers for hire, and with a special force to the latter. (4) That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire."

In Waterbury v. Railroad Co., 17 Fed. 671, the doctrine is thus stated (syllabus):

"The right which a passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his being there creates a duty on the part of the company to carry him safely. It suffices to enable him to maintain an action for negligence if he was being carried by the railroad company voluntarily, although gratuitously, and as a matter of favor to him."

The principles recognized in the cases we have cited, and in numerous other decisions, were correctly applied by the judge who presided in the court below. The plaintiff Pierson, as an express messenger, was rightfully on the train of the defendant, in the performance of duties which the railroad company had, by its contract with the express company, agreed that he should perform, and which, the contract states, were "for the mutual benefit and account of the parties thereto." Whatever his relation to the railroad company,—whether that of a passenger or employé,—he had a right to maintain an action for any injuries he suffered by reason of the negligence of the defendant company, its agents and servants.

The sixth and seventh assignments of error are based on the refusal of the court to give the following instructions asked by the defendant:

In declining to instruct the jury as follows: "That, as between employer and employés, negligence on the part of the employer is not to be inferred from the existence or occurrence of the accident which caused the injury complained of." In declining to instruct the jury as follows: "That an employer does not become an insurer of the life or safety of his employés, but the duty of the employer to the employé is to furnish and keep the machinery and appliances about which the employé is required to perform his work in a reasonably safe condition."

These requests are mere abstract propositions of law correctly stated, but we fail to see the relevancy when applied to the evidence in this case. The court below correctly stated the law to the jury. The law, as stated, properly applied to the evidence. We find no error in the rulings of the court below, and the judgment of that court is affirmed.

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NOTE.

Right of One on a Train as Licensee or on a Pass to Recover for Personal Injuries Received.

I. General Rules.

1. Extent of Liability and Degree of Care Required Generally.

[a] (U. S. C. C. Minn. 1887) A railroad is bound to exercise a high degree of care for the personal safety of a passenger, though he was traveling on a pass, but there must be reasonable proof of negligence. The mere fact that plaintiff was injured on the train by the door being shut against him does not of itself prove negligence, where the carriage was gratuitous.—Hospes v. Railway Co., 29 Fed. 763.

[aa] (Kan. Sup. 1894) A carrier does not owe to a person riding on its train without a ticket or payment of fare that degree of care for his personal safety that is due to a passenger paying fare, but is liable only for injuries occasioned by the ordinary negligence of its employés.—Railroad Co. v. Berry, 36 Pac. 53, 53 Kan. 112.

[b] (Mass. Sup. 1891) Even if the injured person was a licensee on the train, the railroad company is not liable for his injuries.—Powers v. Railroad Co., 26 N. E. 446, 153 Mass. 188.

[c] (Minn. Sup. 1894) Where a licensee, standing on a railroad car when the train parted and was recoupled, was thrown to the ground and injured by the shock resulting from the parts coming together, the company is not liable for the injury merely because the engineer backed the engine at a dangerous speed. Canty, J., dissenting, on the ground that the evidence showed the conductor to have had an opportunity to warn the engineer or the licensee of the latter's peril.—Pettit v. Railway Co., 59 N. W. 1082, 58 Minn. 120.

[d] (Mo. App. 1888) A railroad pass stipulating that the holder assumes all risks of accidents and damages affords no defense to an action against the company for injuries sustained by the holder, owing to the defective condition of the roadbed and track.—Bryan v. Railway Co., 32 Mo. App. 228.

[e] (Neb. Sup. 1896) There may be a recovery by one, whether he was a passenger or merely a licensee or trespasser, under allegations that he had become a passenger; that defendant failed to stop the train at his destination long enough to permit him to alight safely: that, as he was trying to alight, the train was negligently started; and that he then attempted to get back in the car, and was seized by the conductor, and wrongfully, negligently, and violently pulled from the car, and thrown to the ground, and injured.—Railroad Co. v. Root, 69 N. W. 397, 49 Neb. 900.

[f] (N. Y. App. 1888) The fact that a passenger traveling on a free pass was riding in a drawing-room car, for which he had bought a ticket, does not affect the immunity from liability secured to the railroad by the provisions of the pass; the right to purchase the drawing-room ticket depending on the right to transportation under the pass.—Ulrich v. Railroad Co., 15 N. E. 60, 108 N. Y. 80.

[g] (Pa. Sup. 1887) Although, in Pennsylvania, the fact that a person is riding on a free pass limiting liability for injuries does not relieve the common carrier from liability for injuries caused by its negligence, in a case arising out of an injury occurring in New Jersey, and governed by the law of that state, the fact that the pass is a gratuity will be held sufficient to defeat plaintiff's action.—Railroad Co. v. Bausch, 7 Atl. 731.

[h] (Pa. Sup. 1887) Although the fact that a pass limiting liability is a mere gratuity is sufficient in New Jersey to defeat an action by the passenger against the carrier for negligence, yet an action will lie if the pass, though not paid for directly, was given in part consideration of a lease, to the employer of the passenger, of land belonging to the carrier.—Railroad Co. v. Bausch, 7 Atl. 731.

[i, j] (Tex. Civ. App. 1893) The rule that a person who is on a train of cars through courtesy of the railroad company cannot recover for injuries result-

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ing from the negligence of its employés does not obtain in Texas.—Campbell v. Harris, 23 S. W. 35, 4 Tex. Civ. App. 636.

[k] (Tex. Civ. App. 1894) In an action against a railroad company for injuries to a child while on its cars as a licensee, defendant's liability to the child is not the same as it would be to its employés in and about the same cars.—Railway Co. v. Crum, 25 S. W. 1126, 6 Tex. Civ. App. 702.

[l] (Utah Sup. 1893) Where a person, believing he has a right to do so, rides on a freight train with the consent of the conductor in charge, and, while so riding, is injured through the negligence of the trainmen, the company is liable to him as a passenger, though such train be one which, by the rules of the company, was not allowed to carry passengers.—Everett v. Railway Co., 34 Pac. 289, 9 Utah, 340.

2. Postal Clerks.

[a] (Ind. Sup. 1893) A United States railway postal clerk, who has finished his regular run, and is on a train returning home, riding free on the strength of his photograph commission, in accordance with the custom of the railroad company under its contract to carry the mails, is a passenger, and entitled to damages resulting from the negligence of the railroad's employés, whether he is riding in a passenger car or is in the postal car assisting his fellow clerks in handling the mails.—Railway Co. v. Ketcham, 33 N. E. 116, 133 Ind. 346.

[b] (Mo. Sup. 1891) One in the employ of the United States mail service, and engaged in distributing mail in a car carried by a railroad company for that purpose, is a passenger upon such train, so far as the company's liability for injury is concerned.—Mellor v. Railway Co., 16 S. W. 849, 105 Mo. 455.

[c] (Ohio C. C. 1896) A contract made in the District of Columbia by a railroad company with the United States as to the transportation of mails and postal clerks being governed by the law of the United States, and the supreme court of the United States having held that a postal clerk in cars carried under contract with the government is not a passenger, a state statute limiting the liability of railroad companies for injuries to persons other than passengers applies to an injury to a postal clerk thus carried.—Railroad Co. v. Bishop, 7 Ohio Dec. 73.

[d] (Tex. Sup. 1891) A United States mail agent, who sustains injury while riding in the postal car through the negligence of the railway, is entitled to recover damages therefor, irrespective of any question as to the company's compensation for transporting him.—Railway Co. v. Wilson, 15 S. W. 280, 79 Tex. 371.

3. Trainmen, etc.

[a] (Colo. Sup. 1893) Deceased asked a freight conductor on defendant's railroad to carry him free to a certain point, saying that he had formerly been a railroad man, and was a cripple. The conductor refused. After the train had proceeded some distance, however, the conductor found deceased in the caboose. There were also in the caboose several persons traveling with stock, as well as a fireman seeking employment, none of whom were provided with transportation, or paid fare. The conductor, not liking to put deceased off late at night, in the open country, allowed him to ride. *Held*, that deceased was not a passenger, within Mills' Ann. St. § 1508, furnishing a right of action for injuries to passengers in certain cases.—Railroad Co. v. Headland, 33 Pac. 185, 18 Colo. 477.

[b] (Ind. Sup. 1894) A railroad company is not liable for injury to a person thrown from a car through negligence of the trainmen, he being engaged in working his passage under an arrangement with the conductor and brakeman; they having no authority to employ assistance, and there being no custom or regulation of the company permitting the payment of fare by work on the train.—Cooper v. Railroad Co., 36 N. E. 272, 136 Ind. 366.

[c] (Mass. Sup. 1891) The fact that a person injured in a collision while riding on a freight train at the invitation of the conductor was an old employé of the railroad company, and that some of the conductors had permitted old employés to ride on their freight trains, is not sufficient to establish a custom which would make the company liable to him as a passenger, in the absence of evidence showing that the general officials of the road had notice

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of the action of the conductors, or that such action had so long continued as to give rise to a presumption of knowledge by these officials.—Powers v. Railroad Co., 26 N. E. 446, 153 Mass. 188.

[d] (Tex. Civ. App. 1893) Plaintiff was foreman of a gang of defendant's men, and also kept a boarding car. Plaintiff's wife was staying on the car by the permission and at the suggestion of defendant's agent, under whose orders plaintiff was working at the time she was injured; and the accident was caused by the negligence of a conductor. *Held*, that defendant was liable. —Campbell v. Harris, 23 S. W. 35, 4 Tex. Civ. App. 636.

4. Stockmen.

[a] (U. S. C. C. A. 8th Circuit, 1893) Plaintiff, who was in charge of stock on a freight train, went forward while the train had stopped, to examine his stock. The train started suddenly, and, finding that from its speed he could not board the caboose from the ground, he got upon the top of the train, to walk back to the caboose, as it was customary for cattle men to do under the circumstances. He did not look towards the front of the train, and was struck by a bridge. *Held*, that defendant cannot complain of an instruction that the plaintiff was a passenger, and that carriers must exercise the highest degree of care towards passengers, where the court adds that the general rule should not be applied to one who becomes a passenger on a freight train for the purpose of looking after his stock.—Railway Co. v. Carpenter, 5 C. C. A. 551, 56 Fed. 451.

[b] (Ill. Sup. 1895) A person who is riding on a freight train in charge of stock in shipment, with the consent of the railroad company, whether on a regular ticket or on a drover's pass, is a passenger, and the carrier owes him the same duty as other passengers traveling on passenger trains, which requires it to use the highest reasonable and practicable skill and diligence to protect him from injury.—Railroad Co. v. Blumenthal, 43 N. E. 809, 160 Ill. 40, affirming 57 Ill. App. 538.

[c] (Minn. Sup. 1891) Plaintiff delivered live stock to defendant railroad company for transportation to S., under a contract which provided that plaintiff should load and unload the stock, feed, water, and attend the stock at his own expense and risk, and keep the same securely fastened. The car containing the stock arrived at S. in the night, and was placed on a side track, and plaintiff, after an absence of a few minutes, returned to the car, and lay down. *Held* that, although plaintiff had ceased to be a passenger, yet, if a prudent attention to the stock required him to remain in the car,—and of this the jury was to be the judge,—defendant was bound to exercise care to avoid injuring plaintiff while he was so in the car.—Orcutt v. Railroad Co., 47 N. W. 1068, 45 Minn. 368.

[d] (Minn. Sup. 1891) Where a party having the care of stock in a freight car in the train on which he is a passenger, requiring his attention, attempts to enter the car with the sanction of the conductor, and under his assurance that it would be safe, and that he would have ample time to do so before the train moved, and is injured by the sudden and unexpected movement of the train while in the act of entering the car, the company is liable to him in damages.—Olson v. Railroad Co., 48 N. W. 445, 45 Minn. 536.

[e] (Neb. Sup. 1896) In an action for damages from injuries inflicted by an engine upon a shipper of live stock, who was accompanying and caring for such stock under a drover's pass, the question of the existence of negligence such as would give rise to a cause of action, or of such contributory negligence as would defeat it, is one of fact, to be determined by the jury.—Railway Co. v. Crow, 66 N. W. 21, 47 Neb. 84.

[f] (Neb. Sup. 1898) A shipper of live stock, who receives a pass to enable him to accompany and care for his stock in transit, assumes only such dangers as result from his peculiar duties while the railroad is being carefully operated.—Railroad Co. v. Crow, 74 N. W. 1066.

[g] (Tex. Civ. App. 1893) A provision in a contract of shipment of live stock that the shipper, to whom a shipper's pass on the same train was given, should feed and water the animals on the way, is not void as an attempt by the carrier to relieve itself of its duty in that respect, but is a license to the shipper to look after his stock; and he does not, by exercising such license, lose his status as a passenger, so as to preclude him from recovering

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for injuries, while so engaged, caused by the carrier's negligence.—Railway Co. v. Armstrong, 23 S. W. 236, 4 Tex. Civ. App. 146.

[h] (Utah Sup. 1896) The defendant entered into a contract with one N. to transport sheep, under which plaintiff accompanied them as an attendant. The cars in which the sheep were placed were provided with doors at either end, so that the attendants could pass from the caboose through the cars, and care for the sheep. On the way the conductor put on three refrigerator cars, between the sheep cars and the caboose; thus obliging the plaintiff, against his protests, to cross the refrigerator cars, on the running boards on top of these cars, which were higher than those containing the sheep. At a certain point on the road the train passed through a snowshed, which was built before the construction of the refrigerator cars, and was not high enough for a person to walk on top of the cars when passing through the shed. The conductor gave the plaintiff no warning of the shed, nor of the danger arising from walking on top of the refrigerator cars while passing through said shed. Plaintiff had been in the cars to care for the sheep, and was returning to the caboose, with his back to the engine, walking on one of the refrigerator cars, when he was struck by a crosspiece, and received the injury complained of. There was no whistle sounded or warning given when the train approached the snowshed. *Held* error to grant a motion for a nonsuit.—Saunders v. Southern Pac. Co., 44 Pac. 932, 13 Utah, 275.

5. Persons Assisting Passengers.

[a] (Ark. Sup. 1892) If the employés of a railroad offer to assist a lady to a seat in one of its cars, no other person has a right to enter the car for that purpose, and, if he does so, the company owes him no duty, except not to injure him willfully or wantonly.—Lawton v. Railway Co., 18 S. W. 543, 55 Ark. 428.

[b] (Ga. Sup. 1889) Where plaintiff went on board defendant's train at a station to assist his daughter and her infant children in securing seats as passengers, and the train, after stopping the usual time, started before plaintiff got off and without having given any notice to him, he could not recover for injuries received in alighting from the train while in motion, in the absence of evidence that defendant's agents knew that he had come aboard, or of any usage or custom to give notice in such cases.—Coleman v. Railroad Co., 10 S. E. 498, 84 Ga. 1.

[c] (Ind. Sup. 1889) An instruction that, if defendant agreed to receive the invalid as a passenger, it was necessary for him to be carried into the car, and that defendant's conductor knew, or had reasonable grounds to believe, that plaintiff entered the car as an assistant in carrying the invalid, the jury may find that plaintiff rightfully entered the car, and that defendant owed him the same duties while rendering such assistance and while leaving the car as it owed its passengers, is correct.—Railroad Co. v. Crunk, 21 N. E. 31, 119 Ind. 542.

[d] (Mo. Sup. 1893) It is not negligence for a carrier to start its train at a station before a person who has assisted a passenger on board has had time to get off, unless it has notice of his intention to get off.—Yarnell v. Railroad Co., 21 S. W. 1, 113 Mo. 570.

[e] (Tex. Civ. App. 1894) A complaint alleging that plaintiff procured one P., about to become a passenger on defendant's train, to transport his baggage; that it was defendant's custom to permit persons to assist passengers, with their baggage, into its trains; and that plaintiff assisted P. to enter defendant's train with plaintiff's baggage, and, while leaving the car, was injured by the careless and wanton conduct of defendant, in causing the locomotive to run into the car,—was demurrable, since plaintiff was a trespasser, and defendant was bound to abstain from injuring him only after being aware of his danger.—Andrews v. Railway Co., 25 S. W. 1040.

[f] (Tex. Civ. App. 1894) In an action for personal injuries to plaintiff while alighting from a railway train after bidding a passenger good-by, it is error to refuse to charge that, in order to found a verdict for plaintiff on the fact that the station was not properly lighted, the jury must first find that defendant, in starting its train, violated some duty it owed to plaintiff.—Railway Co. v. Miller, 27 S. W. 905, 8 Tex. Civ App. 241.

[g] (Tex. Civ. App. 1895) A person who boards a train merely to assist

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another to a seat must give notice of his intention to get off, to hold the company liable for not giving him time therefor; the train having stopped the usual and a reasonable time for passengers to get on and off, and he having of his own volition jumped off after it had started.—Dillingham v. Pierce, 31 S. W. 203.

II. CONTRACTS RELEASING CARRIER FROM LIABILITY.

1. In General.

[a] (Ill. App. 1890) A stipulation in a free pass that the railway company shall only be liable for gross negligence is valid.—Railroad Co. v. Hawk, 36 Ill. App. 327.

[b] (Ill. App. 1895) A person riding on a pass may recover for personal injuries received through gross negligence of the company, though the pass contains a condition that he shall assume all risks of accident.—Railroad Co. v. O'Keefe, 63 Ill. App. 102.

[c] (Mass. Sup. 1890) Where one accepts, as a gratuity, a free pass, an agreement to assume all risk of accident which may happen to him while traveling thereon, by which he may be injured in his person, is valid; and one availing himself of such a ticket is estopped to deny that he made the agreement expressed therein because he did not and was not requested to sign it.—Quimby v. Railroad Co., 23 N. E. 205, 150 Mass. 365.

[d] (Mass. Sup. 1892) A contract whereby a passenger, in consideration of being allowed by a railroad company to ride in the baggage car, agrees to "assume all risk of accidents and injuries resulting therefrom, and hold said company free and discharged from all claims and demands in any way growing out of any injuries received by him while so riding," relieves the company from liability to the passenger for injuries received by him while so riding, though his being in the baggage car did not contribute to the injury.—Hosmer v. Railroad Co., 31 N. E. 652, 156 Mass. 506.

[e] (Me. Sup. 1894) One who uses a free pass for carriage, containing a condition that he will assume all risk of personal injury, is deemed to have accepted it on that condition, whether he reads it or not.—Rogers v. Steamboat Co., 29 Atl. 1069, 86 Me. 261.

[f] (Me. Sup. 1894) A condition in a free pass exempting the carrier from all liability for personal injury is valid.—Rogers v. Steamboat Co., 29 Atl. 1069, 86 Me. 261.

[g] (Tex. Civ. App. 1892) Where plaintiff, by a written contract with defendant railway company, in consideration of transportation between certain points agrees not to hold defendant for any damages or injury suffered during the journey, defendant is not liable for mental suffering caused plaintiff by his ejection from a train on a road other than its own. Harris v. Howe, 12 S. W. 224, 74 Tex. 534, and Railway Co. v. Baird, 12 S. W. 530, 75 Tex. 256, followed.—Railway Co. v. Campbell, 20 S. W. 845, 1 Tex. Civ. App. 509.

2. Express Messengers and Employes of Other Contracting Companies.

[a] (U. S. C. C. Ohio, 1897) A railroad company carrying an express messenger in a special car under a contract with the express company cannot, by such contract, limit its liability for injuries to him caused by negligence.—Voight v. Railway Co., 79 Fed. 561.

[b] (Ind. Sup. 1896) The mere fact that an express messenger has contracted with the express company to assume all risks of injury while in its employment, however occasioned, will not entitle a railroad company by which such messenger is transported to the benefit of such contract, of which it had no knowledge.—Railway Co. v. Keefer, 44 N. E. 796, 146 Ind. 21.

[c] (Ind. Sup. 1896) A railroad company which undertakes, as a matter of accommodation, or by special engagement, to carry an express messenger, whom it is not bound to carry, becomes a private carrier, or bailee for hire, as to the thing so carried, and may protect itself by contract from the result of its negligence in respect thereto.—Railway Co. v. Keefer, 44 N. E. 796, 146 Ind. 21.

[d] (Ind. Sup. 1897) An express messenger who goes upon a railroad company's premises by the license given the express company by the railroad company is bound to know that his rights rest on a private contract between

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the two companies, to which he is subject in the performance of his duties, and is chargeable with knowledge of limitations therein on the railroad company's liability for injuries.—Railway Co. v. Mahony, 46 N. E. 917, 148 Ind. 196.

[e] (Minn. Sup. 1896) A contract between a railroad company and a news agent on its train, exempting the company from liability for injuries to the agent caused by its negligence, is void as against public policy, as respects negligence consisting in the violation of a statute requiring trains to be stopped a certain distance from railway crossings.—Starr v. Railway Co., 69 N. W. 632, 67 Minn. 18.

[f] (N. Y. App. 1891) The contract with an express company cannot operate to relieve the railroad company from the same duty to protect a messenger that it owes any other passenger, or from the same liability for its negligence. —Brewer v. Railroad Co., 26 N. E. 324, 124 N. Y. 59, affirming 45 Hun, 595.

[g] (N. Y. App. 1891) A clause in a contract between an express company and a railroad company that the latter is "hereby expressly released from and guarantied against any liability for any damage done to the agents of the [express company], whether in their employ as messengers or otherwise," is not such an unequivocal exemption of the railroad company as will bar an action against it for the death of an express messenger, injured while on the road by the negligence of its servants.—Kenney v. Railroad Co., 26 N. E. 626, 125 N. Y. 422, affirming 7 N. Y. S. 255.

[h] (N. Y. Sup. 1889) An agreement between a railroad company and an express company, that the former shall not be liable for any injury done to an employé of the latter, it being part of a contract by which the former was to carry goods for the latter at special rates, and to allow a messenger of the latter to go on each train free of charge, does not exonerate the railroad company from liability for its negligence resulting in the death of a messenger, who was ignorant of such agreement.—Kenney v. Railroad Co., 7 N. Y. Supp. 255, 54 Hun, 143.

[i] (N. Y. Super. Ct. 1890) By a contract between a railroad company and a telegraph company, the former agreed to pass the officers and employés of the telegraph company when traveling on telegraphic business, provided they had passes of the railroad company, "in which all responsibility of the railroad company for any loss or damage or injury to said officers and employés shall be waived and released in the form usual in such cases." In an action against the railroad company for injuries by its negligence to a telegraphic employé, defendant offered in evidence the contract, and also offered to prove that, at the time of the injury, plaintiff was riding upon a pass issued thereunder, on business of the telegraph company. *Held*, that this did not constitute a defense, in the absence of proof of the stipulations contained in the pass, as the contract did not exempt from liability for negligence, but provided for a release therefrom to appear on the pass.—Elliott v. Railroad Co., 11 N. Y. Supp. 691.

3. Stockmen, etc.

[a] (U. S. C. C. A. 1st Circuit, 1898) Provisions in a contract for transportation of cattle by rail that when the person accompanying them shall leave the caboose, and pass over or along the cars or track, he shall do so at his own sole risk, and that the carrier will not be required to stop or start its trains at or from depots or platforms, do not extend the exemptions beyond the ordinary hazards peculiar to the running of stock and freight trains and to freight yards, and consequently do not include damage by a water spout which is negligently permitted to project too near the moving cars.—Railroad Co. v. Nichols, 29 C. C. A. 500, 85 Fed. 945.

[b] (U. S. C. C. A. 3d Circuit, 1895) Where a railroad contracts to carry a car of live freight with a man in charge, who is to travel free, which car is to be carried to its destination over a connecting road, and the connecting road receives the car with a through waybill, stating such condition, the man in charge of the car is a passenger for hire on such connecting road, and a release of damages exacted from him is without consideration, and void.—Railroad Co. v. Ashley, 14 C. C. A. 368, 67 Fed. 209.

[c] (U. S. C. C. A. 8th Circuit, 1898) A condition in a cattle dealer's ticket

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limiting the extent of the railroad company's liability "to him" in case of an accident does not apply to the statutory liability in favor of his next of kin in case of his death by the company's negligence.—Clark v. Geer, 86 Fed. 447.

[d] (Ill. App. 1896) A shipper injured while riding on a train, under a contract that he shall care for his own stock, and that he must ride in the caboose, may recover, although he was in the car with his stock, if he was properly and necessarily engaged in caring for it at the time.—Railroad Co. v. Beebe, 69 Ill. App. 363.

[e] (Ind. Sup. 1890) In a contract by a railroad company for the transportation of cattle, a stipulation is void by which, in consideration of a free pass, the person in charge of the cattle releases the company from liability for any injury sustained by him; and the responsibility for negligence, and the presumption thereof from a collision, are the same in such case as in case of an injury to a passenger who pays full fare.—Railway Co. v. Faylor, 25 N. E. 869, 126 Ind. 126.

[f] (Neb. Sup. 1896) A provision in a contract for the shipment of live stock, under which a shipper's pass is issued, that the person traveling on the pass shall be deemed an employé of the railroad company, and entitled to recover of the company only for such injuries or damages as might be recovered by a regular employé, is invalid, in so far as it requires such person to assume risks beyond those incidental to taking care of the stock, and hence to that extent does not preclude a recovery by such person for personal injuries caused by neglect of the company to perform its duties as a common carrier for hire.—Railway Co. v. Tietken, 68 N. W. 336, 49 Neb. 130.

[g] (N. Y. Sup. 1891) A shipper of cattle entered into a contract with defendant railroad company whereby, in consideration of reduced rates of transportation, and a free pass to accompany the cattle, he released defendant from all damages to such cattle, except such as might arise from the fraud or willful misconduct of the company. Plaintiff was employed by the shipper to go with the cattle, and was designated in the contract and in the waybill as in charge free. *Held*, that the contract with the shipper did not affect defendant's liability to plaintiff for injuries received while traveling in charge of such cattle.—Porter v. Railroad Co., 13 N. Y. Supp. 491, 59 Hun, 177.

[h] (N. Y. Sup. 1891) Plaintiff was in charge of a car load of horses. Before arriving at B., the conductor told plaintiff that he would thereafter have to ride in the car with his horses; that at B. the train would stand for 45 minutes where left; and that plaintiff could get supper, and then take the train. At B. plaintiff left the train for supper, and returned in about 30 minutes, when the train had been shifted two tracks further off, and a locomotive attached to its rear. To get on the train, plaintiff had to walk around such engine by a passage used by defendant only in connection with its cattle yards. He passed close to the engineer, who was looking in the direction plaintiff was going. While entering the car by the side door, the train started, injuring plaintiff. Plaintiff was riding on a ticket issued to drovers, and which contained a clause that, if the person in charge of the stock should leave the caboose and pass along the train or track, it was at his own risk of personal injury. *Held*, that this did not relieve defendant of its liability.—Pitcher v. Railway Co., 16 N. Y. Supp. 62, 61 Hun, 623.

[i] (N. Y. Sup. 1895) The fact that a person in charge of his employer's horses, who takes passage in the car in which the horses are being transported, without having made any personal contract with the railroad company, knows that his employer made arrangements with the railroad company for his transportation, does not charge him with knowledge that the contract between his employer and the company exempted the company from liability for any injuries that might be received by him while traveling in such car.—Coppock v. Railroad Co., 34 N. Y. Supp. 1039, 89 Hun, 186.

[j] (S. Dak. Sup. 1894) A special contract for transporting live stock and emigrant movables, made between a railroad company and a shipper, that the shipper may pass upon the same train to care for his stock, and load and unload the same, at his "own risk of personal injury, from whatever cause," is a valid contract, and exonerates the carrier from all liability for any injury to the shipper while a passenger upon such train, not caused by the gross

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negligence, fraud, or willful wrong of the company or its servants.—Meuer v. Railway Co., 59 N. W. 945, 5 S. D. 568.

[k] (S. Dak. Sup. 1894) A shipper who has the right to pass on a train with his cattle, "at his own risk of personal injury, from whatever cause," is within the exemption of such a contract while unloading his stock after the car has arrived at its destination, though before the injury the shipper had left the car to get lanterns and assistance.—Meuer v. Railway Co., 59 N. W. 945, 5 S. D. 568.

[l] (Tex. Civ. App. 1898) A shipper of stock given a pass to accompany the same is a passenger, entitled to recover of the carrier for injury through negligence of employés, notwithstanding stipulation in contract that he feed and water his stock, and during the passage be deemed an employé of the company, and assume all risks incident to his employment.—Railway Co. v. Nelson, 44 S. W. 179.

III. Defenses.

Contributory Negligence.

[a] (Ill. Sup. 1887) Deceased, a shipper of stock, was entitled to transportation from the switch yard to the stock yards The only means furnished were the top of a stock car or the engine. By direction of the engineer, he got upon the footboard of the engine. The defendant asked for the instruction that common prudence dictated that he should put himself in the safest place possible, and, if the engine was not as safe as the car, he was guilty of negligence. *Held*, that the instruction was properly refused, as it ignored the question whether the deceased was directed to take the place he did by defendant's servants, and also their negligence in the management of the engine.—Railroad Co. v. Brown, 14 N. E. 197, 123 Ill. 162.

[b] (Kan. Sup. 1889) Where a shipper of stock over defendant's road at the request of the conductor voluntarily goes upon the top of a freight car to help signal, and is injured by a sudden motion of the train, defendant is not liable therefor.—Railroad Co. v. Lindley, 22 Pac. 703, 42 Kan. 714.

[c] (Md. App. 1890) A postal clerk of the railway mail service, holding a photographic commission entitling him to ride as a passenger on a railroad train while on duty and in returning home, who, with the conductor's permission, rides, while off duty, on his way home, in the postal car, is not per se guilty of contributory negligence, so as to defeat an action for his death, caused by a collision, though the postal car was subject to greater risks than the cars intended for passengers, and if he had remained in the smoking car, in which he commenced his journey, he would probably have escaped injury. —Railroad Co. v. State, 18 Atl. 1107, 72 Md. 36.

[d] (Neb. Sup.1896) Where one traveling on a stock shipper's pass was suddenly notified that his train was leaving the station, and, on reaching the moving train, was ordered by the conductor to board a freight car some distance ahead of the caboose, and fearing that if he waited for the caboose he would be unable to board it, because of the increasing speed of the train, and not knowing of the danger attending the boarding of a freight car, attempted to obey the order, and received injuries, tne question whether he was guilty of contributory negligence was for the jury.—Railway Co. v. Tietken, 68 N. W. 336, 49 Neb. 130.

[e] (Tex. Sup. 1891) Where the plaintiff, who was a United States mail agent, was riding in the proper place in his car, the fact that such car was more dangerous to ride in than other cars in no way affects the right of recovery.—Railway Co. v. Wilson, 15 S. W. 280, 79 Tex. 371.

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(87 Fed. 637.)

MUTUAL LIFE INS. CO. OF NEW YORK v. LOGAN.

(Circuit Court of Appeals, Ninth Circuit. February 28, 1898.)

No. 383.

1. ACTION ON INSURANCE POLICY—EVIDENCE—DECLARATIONS.
   In a suit by an executor to collect an insurance policy upon the life of his testator, when the issue is whether or not the contract was consummated, it is error to allow the plaintiff to testify to declarations by his testator going to show that he acknowledged liability upon his premium note, in order to show an acceptance by him of the policy. The suit being on the policy, and not on the note, such declarations cannot be considered as against interest.

2. SAME—RES GESTÆ.
   Declarations made 10 days after the alleged delivery of an insurance policy cannot be admitted in evidence, as part of the res gestæ, to show such delivery.

3. INSURANCE—PREMIUM NOTE—AUTHORITY OF AGENT TO ACCEPT.
   The agent of a life insurance company, authorized to close the contract by delivering the policy and collecting premiums, has, in general, implied authority to accept notes for the premiums.[1]

4. SAME—RULES OF COMPANY—VIOLATION—WAIVER.
   When the general agent of an insurance company has knowledge of frequent violations by a subagent of a rule of the company prohibiting the acceptance of notes for premiums, and makes no serious objection, the company must be deemed to have waived the application of the rule.[1]

5. SAME—EFFECT AS TO THIRD PARTIES.
   A person dealing with an insurance company cannot be bound by a rule of the company forbidding the taking of premium notes, which is intended for the guidance of its agents, and of which he has no knowledge.

6. SAME—INSTRUCTIONS—PREMIUM NOTE—ALLOWANCE BY EXECUTOR.
   Where a premium note has been negotiated by the agent of the company, and, on presentation by the assignee, allowed by the maker's executor as a claim against the estate, it is error to refuse to instruct that such action by the executor cannot bind the company, the issue being whether or not the contract was ever consummated.

7. TRIAL—WEIGHT OF EVIDENCE.
   When there is a variance between the testimony of a witness and statements made by him in letters at the time of the transaction in question, and the letters are in evidence, it is error to instruct that greater weight must be given to the testimony than to the statements in the letters. It is for the jury to say which statement they will accept.

In Error to the Circuit Court of the United States for the District of Oregon.

The action was brought by Lysander S. Logan, the defendant in error, as executor of the last will and testament of Thomas J. Logan, deceased, to recover $10,000 and interest, alleged to be due upon a certain policy of insurance claimed to have been issued by plaintiff in error, the Mutual Life Insurance Company of New York, upon the life of Thomas J. Logan. The case was tried in the court below before a jury, which rendered a verdict for the plaintiff, the defendant in error here, in the sum of $10,000, with interest at 6 per

[1] As to waiver of prepayment of insurance premiums and authority of agents, see note to Smith v. Society, 13 C. C. A. 292.

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cent. per annum from September 28, 1894. Judgment was entered December 28, 1896, to reverse which the defendant sued out this writ of error.

The policy in question was for the sum of $10,000, was numbered 581,368, and was issued by the company on August 28, 1893. The defense interposed in the court below was that the contract of insurance was never consummated by Thomas J. Logan. That was the only issue in the case. Thomas J. Logan resided near Prineville, Crook county, Or., and on the 26th day of August, 1893, signed an application for insurance, and at the same time and place executed a promissory note payable to his own order for the sum of $1,185, due on November 1st thereafter, payable at the First National Bank of Prineville. The sum of $1,185 was the amount of the premium. The note was indorsed in blank by the maker, and delivered at the time of the signing of the application to one William Johnson, who appears to have been a solicitor of insurance. The application was accompanied with a medical examiner's report, also signed by Thomas J. Logan, and made by H. P. Belknap, medical examiner, of the same date, and was forwarded to one F. L. Stinson, an agent of the defendant company at Seattle, Wash., and was by him in turn forwarded to A. B. Forbes & Son, at San Francisco, the general agents of the plaintiff in error for the Pacific Coast, and by them in turn forwarded to the home office of the company, in New York. Thereafter a policy in the form called for by the application was issued, and forwarded to Stinson, at Seattle.

On October 18, 1893, Stinson wrote Logan, from Seattle, the following letter:

"The Mutual Life Insurance Company of New York. Richard A. McCurdy, President. F. L. Stinson, General Agent for Washington and Oregon.

"Seattle, Washington, Oct. 18th, 189–.

"Thos. J. Logan, Esq., Prineville, Or.—Dear Sir: I take pleasure in informing you that the company have accepted your risk for $10,000, and have issued policy No. 581,368, and I have forwarded same this day, together with your note for $1,185, to the First National Bank of Prineville, where the latter is payable. If you wish to take the note up at once, I will allow you a discount of 1 per cent. from the face value. * * *

"Yours, very truly, F. L. Stinson, General Agent."

Stinson also wrote and sent the following letter to the First National Bank of Prineville:

"The Mutual Life Insurance Company of New York. Richard A. McCurdy, President. F. L. Stinson, General Agent, Washington, Oregon.

"Seattle, Washington, Oct. 18th, 1893.

"First National Bank, Prineville, Or.—Dear Sirs: Inclosed please find policy No. 581,368, T. J. Logan, amount, $10,000, together with his note due Nov. 1st, in amount $1,185, which please collect and remit, less your charges, cost of exchange, etc. Kindly deliver the policy to Mr. Logan upon payment of note. If he wished to pay same at once, 1 per cent. from the face of note will be deducted.

"Yours, very truly, F. L. Stinson, General Agent."

To this communication the bank made the following reply:

"First National Bank, Prineville, Or.

"Prineville, Oregon, 11—1, 1893.

"F. L. Stinson, Esq., Genl. Agent, Seattle—Dear Sir: * * * Policy of T. J. Logan received. Mr. Logan says he is unable to pay, and desires that the policy be surrendered, and note returned to him. Please advise. * * *

"Yours, respectfully, T. M. Baldwin, Cashier."

Stinson thereupon advised the bank as follows, under date of November 6, 1893:

"First National Bank, Prineville, Oregon—Dear Sirs: I have your favor of the 1st inst. * * * Regarding T. J. Logan, I note what you say. Please hold the policy subject to his call; that is, when he pays the note, deliver same to him. If the note is not paid within four days from receipt of this letter, kindly return same to me, and I will proceed to collect same. Will you kindly advise me if Mr. Logan is good for the amount of his note? If he will pay one-half

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of the face of the note, kindly accept and indorse same, and have promised him time to pay the balance. Thanking you in anticipation of an early reply,

"Yours, very truly, F. L. Stinson, General Agent."

He also, on the same day, wrote to Thomas J. Logan the following letter:

"The Mutual Life Insurance Company of New York. Richard A. McCurdy, President. F. L. Stinson, General Agent, Washington, Oregon.

"Seattle, Washington, Nov. 6th, 1893.

"T. J. Logan, Esq., Prineville, Or.—Dear Sir: I am advised by the First National Bank, under date of the 1st inst., that you state that you are unable to meet your note of $1,185, which I had sent to the above bank for collection, same being due on Nov. 1st. I had hoped that you would have met this note promptly, and trust that upon receipt of this you will take the same up immediately. If unable to pay the full amount, if you will pay half of the note I will give you time on the balance. I must insist, however, upon the payment of at least half immediately. Kindly let me hear from you by return mail, and oblige,

"Yours, very truly, F. L. Stinson, General Agent."

The bank, on the 14th of November, 1893, sent the following communication to Stinson:

"First National Bank of Prineville.

"Prineville, Or., Nov. 14th, 1893.

"F. L. Stinson, Esq., General Agent, Seattle, Wash.—Dear Sir: I return herewith your note on T. J. Logan for $1,185.00. Payment refused. Mr. Logan refuses to accept policy.

"Yours, very truly, T. M. Baldwin, Cashier."

To this letter Stinson sent the following letter to the bank:

"The Mutual Life Insurance Company of New York. Richard A. McCurdy, President. F. L. Stinson, State General Agent, Washington, Oregon.

"Seattle, Washington, Nov. 20th, 1893.

"First National Bank, Prineville, Or.—Dear Sirs: I have your favor of the 14th inst., returning note of T. J. Logan, in amount $1,185. Please hold the policy subject to Mr. Logan's call. Kindly advise me the amount of expenses for your trouble in this matter, and I will remit.

"Yours, very truly, F. L. Stinson, General Agent."

Thereafter the policy appears to have continued in the possession of Baldwin until March 29, 1894, when he returned the same to W. S. Pond, at that time the cashier of the plaintiff in error, at Seattle, Washington, upon a request as contained in the following letter:

"The Mutual Life Insurance Company of New York. Richard A. McCurdy, President. F. L. Stinson, State General Agent, Washington, Oregon.

"Seattle, Washington, March 24, 1894.

"First National Bank, Prineville, Or.—Dear Sirs: Kindly send the Logan policy here, No. 581,368, as per inclosed order from Mr. F. L. Stinson, and oblige,

"Yours, very truly, Wm. S. Pond, Cashier."

It was subsequently sent on to the company's home office for cancellation. The note was returned to Stinson, as per his request, on or about November 20, 1893. It was by him given to the National Bank of Commerce, at Seattle, Wash., to secure the payment of advances made to him by the bank prior to November 25, 1893, and for further advances to be thereafter made. On November 25, 1893, the note was mailed by the bank to one J. Park Henderson, an attorney at law, at Portland, Or., to endeavor to collect for the bank. Suit was thereupon brought on the note on November 29, 1893, by Henderson. A demurrer, answer, and reply were successively filed, and it appears that on May 7, 1894, following, the suit was dismissed without prejudice by order of court, on motion of counsel for defendant, Thomas J. Logan. Nothing appears to have been done in regard to collection of the note, beyond its being held by the National Bank of Commerce as collateral for moneys theretofore and thereafter

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advanced to Stinson, until August 31, 1894, when it was sent by the National Bank of Commerce to the First National Bank of Prineville, Or., in a letter dated July 31, 1894. It was returned to the National Bank of Commerce by a letter dated August 29, 1894, which reads as follows:

"First National Bank of Prineville.

"Prineville, Or., Aug. 29th, 1894.

"The National Bank of Commerce, Seattle, Wash.—Dear Sirs: We return herewith your collection, No. 8,553, T. J. Logan, for $1,185 and interest. T. J. Logan, the maker, is now dead, and his son, L. S. Logan, is the executor of his will. He informs me that the note will have to take the regular course of such matters in this state. A copy of the note, duly sworn to, must be filed with the executor, and paid by order of the probate judge.

"Yours, very truly, [Signed] T. M. Baldwin, Cashier."

It further appears that the note was thereafter filed and proved up against the estate of Thomas J. Logan, deceased, by the National Bank of Commerce. The latter died at Prineville, Or., July 10, 1894.

The deposition of Baldwin, the cashier of the First National Bank of Prineville, was introduced in evidence, from which it appears that he testified as follows in regard to his possession of the policy and his conversations with Logan in regard to it: That he knew Thomas J. Logan; that he (the witness) was cashier of the First National Bank at Prineville, Or., and had been such for nine years past continuously; that he was cashier in November, 1893, and remembered receiving a promissory note signed by Thomas J. Logan, dated at or near Prineville, Or., August 26, 1893, whereby said Logan promised to pay to the order of himself, on November 1, 1893, the sum of $1,185, with interest; that he received the letter of October 18, 1893, from F. L. Stinson, containing policy of insurance No. 581,368, with the note above referred to. The deposition showed that the witness was asked the following question, among others, upon examination in chief: "Q. What did you do with the policy after receiving this letter?" After objection and exception, he replied: "I filed it in Mr. Logan's name in the bank." That the policy was placed in a case kept for that purpose, alphabetically arranged, under Mr. Logan's initials; that the case was kept for the purpose of holding the papers of customers of the bank; the bank habitually had papers there belonging to Mr. Logan, but could not say that any were there at that particular time; the papers were kept for safe-keeping; that it was customary for the bank to receive and safely keep papers for its customers and patrons; that Mr. Logan was a patron of the bank, and that there was a definite understanding between the bank and Mr. Logan that the bank should keep his papers for safe-keeping, they being left there and received by the bank as an accommodation to him; that the custom alluded to had existed ever since the bank was organized, which was about six years prior to the date last referred to; that upon the receipt of the letter from Stinson of October 18, 1893, he gave the policy and note to Logan; that he thinks Logan took the policy in his hands, and then handed it back; that Logan did not refuse absolutely to accept the policy; that Logan did not instruct him to return the policy, but that he did not remember that Logan instructed him to keep the policy for him; that Logan told him that, if he could not raise the money, he would like to return the policy; that he received no instructions or directions with relation to this policy from Logan after November 14, 1893; that he did not remember having any communication with him or any one acting for him after that time; that he might not remember, as it was a good while ago; that he did not remember that Logan instructed him to keep the policy for him; that he (Logan) did not instruct him to return the policy; that subsequent to November 20th, when Stinson wrote to the First National Bank telling them to "hold the policy subject to Mr. Logan's call," he held the policy subject to Mr. Logan's call; that, had Logan called for the policy while it was in the bank subsequent to that date (November 20, 1893), he would have delivered it to him; that Logan made no objection to receiving the policy subsequent to the date witness received instructions from Stinson to hold the policy subject to his call; that, when he said that Logan desired to have the policy returned and his note delivered to him, he (witness) was referring to a time prior to November 20, 1893; that he thought he must have informed Logan

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that the policy was in his box after November 20, 1893, but that he had no distinct recollection as to the time, and thought so because it would have been their custom to do so. He further deposed as follows: "Q. Have you any distinct recollection that you are willing to say certainly that you notified him that you had placed the policy with his papers? A. I don't remember distinctly of notifying him at that time. Q. You can't say whether you did or not? A. Only it being in the line of my duty to do so. Q. It was your custom to do so? A. Yes, sir. Q. But you knew there had been a refusal on Mr. Logan's part to accept this policy before that because he could not pay this note? A. That was the only reason he ever gave. Q. You knew the fact that he refused to take the policy, didn't you? A. I knew that he could not take it under the circumstances. Q. Well, you knew that he had declined to accept the policy, and wanted you to return it? A. On the ground I have stated. Q. You knew that. Now, knowing that fact, did he ever change his mind or instructions to you in reference to that policy to your knowledge? A. No." The witness further testified, substantially as follows: That before writing the letter of November 1, 1893, he conferred with Logan in reference to the payment of the note and the delivery of the policy, and that said letter was written from what Logan told him; that before writing the letter of November 14, 1893, he also conferred with Logan in reference to the note and policy, and that said letter was also written from what Logan told him; that he had only one conversation with Logan up to that time; that the letter of November 1, 1893, was written shortly after said conversation, and that of November 14, 1893, was also based on said conversation; that no person was present at the conversation; that he thought that after receiving the letter of date November 6, 1893, he must have communicated to Logan the offer of Stinson that, if he could pay half of the face of the note, he might have time on the balance; that Logan did nothing in relation thereto; that he does not remember what Logan said in reference thereto; that Logan did not show him a letter he had received from Stinson bearing the same date, with reference to this matter; that he (witness) never saw such letter. The witness further testified that about March 29, 1894, he received a letter of date March 24, 1894, from W. S. Pond, inclosing an order from F. L. Stinson, dated March 14, 1894, both addressed to the First National Bank of Prineville, Or., and that he acted upon the said order and letter, by returning, on March 29, 1894, the policy to W. S. Pond, Seattle, Wash.; that he did not remember notifying Logan that the policy was to be returned; Logan never told him to return the policy; was an intimate friend and intimate business acquaintance of Logan for many years; does not remember that he notified Logan that the parties had requested a return of the policy; Logan had not called for the policy, and he (witness) wanted to see him get his note back; that he took the liberty to return the policy; that he felt authorized to return the policy from what he knew of Logan's wishes in the matter; that he does not remember that he communicated with Logan after returning the policy as to his having done so; does not remember having told him that he returned it. He further testified that he did not notify Stinson that he had placed the policy among or with Logan's papers, and that Stinson did not know the fact, nor did Logan; that he put the policy in the note case for the first time after he received the letter advising him to hold it subject to Logan's call.

F. L. Stinson testified that he was the state general agent of the Mutual Life Insurance Company of New York for Washington and Oregon; that his head office was at Seattle; that the company knew of this designation; that his letter heads sent to him by the company indicated that he was general agent for the states of Washington and Oregon; that his duties were to solicit applications for insurance, to collect premiums, and to deliver policies, remitting the premiums to the company; that, as such agent, it had been his custom to receive notes in payment of policies in lieu of money; that he had upon one or two different occasions told a Mr. Forbes, the general agent of the company for the Pacific Coast, that he had taken a great many notes in payment of premiums; that Mr. Forbes advised him not to take too many notes; that he should be careful in taking notes; that it had been his custom to deliver policies prior to the payment of the notes in many cases. The witness further stated that he remembered receiving an application for a policy in this com-

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pany from Logan, and that he received the same from William Johnson, the agent; that he received at the same time the promissory note; that, after receiving the application and the note, he took a copy of the application, and sent the original to A. B. Forbes & Son; that the application was accepted by the company; that he received from the company a policy in accordance with the requirements of the application; that he sent the policy and note to the First National at Prineville, Or.; that the National Bank of Commerce of Seattle got the note from him, he having sold it to that bank for certain indebtedness due by him to the bank; that the note was taken as collateral security; that he had told Mr. Forbes, upon one occasion, of the fact that he had sold this note to the National Bank of Commerce; that, when he took the note from Logan, he took it as payment for the premium; that he never advised Mr. Logan or consented to return to Mr. Logan his note in accordance with the wishes purported to have been expressed by the latter as contained in the letter of Mr. Baldwin of November 1, 1893; that he told Mr. Forbes, upon the occasion of the latter's visit to Seattle about the last of November, 1893, that he had sold the note to the National Bank of Commerce; that Mr. Forbes asked him regarding the payment on the Logan policy, and that he told about the note, and where it was, and that he told him, further, that he (the witness) could not get the note without paying for it; that it was in the bank, and he (witness) could not get it without paying at least one-half of the note; that Mr. Forbes said he would look into the matter, and see what could be done; that he (witness) thought this conversation occurred in November, 1893, but he would not be positive; that, before writing the letter to the Prineville Bank wherein he told Mr. Baldwin to hold the policy subject to Mr. Logan's call, he had investigated the personal responsibility of Thomas J. Logan, the maker of the note, and had found it good; that, at the time he took the note, it was received by him in payment of the premium; that the policy had not then been received; that the note was to mature November, 1893, and he intended that the policy should be tendered at the time the note matured; that he did not intend that the policy should be delivered to Mr. Logan before the payment of the note; that he could not say that he did not intend at any time to deliver the policy until after he had collected the money that was due upon the note; that he does not remember ever having seen the rules and regulations issued by the company; that he did not think he received a printed copy of the rules and regulations, edition of March, 1893, from Mr. Forbes, governing him in his business, and did not have any printed instructions at all; that he did not know that, as an agent, he was expressly prohibited from receiving notes as payment for premiums.

A. B. Forbes, whose deposition was taken on behalf of the plaintiff in error, testified that he was the general agent of the company for the states of California, Nevada, Oregon, Washington, and other Pacific states and territories; that F. L. Stinson was his subagent, with limited powers; that he does not know why the policy to Logan was never delivered, if it was not delivered, except from correspondence about the policy after it was sent to Stinson; that in the latter part of 1893 he visited Seattle, and was then told by Mr. Stinson that delivery had not been made because Mr. Logan had not paid the premium; that he then told Stinson that a re-examination must be had, and the premium paid, before the delivery of the policy, and that he must give it immediate attention; that nothing was then said by Stinson to witness about any note made by Mr. Logan being hypothecated in any bank, nor did the witness know of the fact; that he did not recollect any conversation with Stinson about the particular note of Thomas J. Logan for $1,185, payable to his own order. The witness further testified, and produced and made a part of his deposition a pamphlet book, entitled, "Suggestions for the Guidance and Instruction of Local Agents and Solicitors, Edition of March, 1893, Published for the Mutual Life Insurance Company of New York"; that Stinson had a copy of such pamphlet book of rules; that among such rules was the following: "Agents are expressly prohibited from receiving notes as payment for premiums." The witness further testified that he had no knowledge of the taking of promissory notes for the payment of premiums by soliciting agents of F. L. Stinson or by F. L. Stinson, and that, after 60 days from the date of the policy, a re-examination of the applicant was required, and the premium was required to be paid before the

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policy was delivered; that Stinson was not a general agent; that he was a sub-agent, he (witness) being the general agent for the company on the Coast; that Stinson held himself out as general agent, with the knowledge of witness; that he was in the employ of witness; that he had no doubt that Stinson represented himself as general agent of the company.

The plaintiff, Lysander S. Logan, son of the deceased, Thomas J. Logan, and defendant in error here, testified, over the objection of plaintiff in error, that he had a conversation with his father about the 1st of December,—the early part of December,—regarding the note and policy; that his father told him he had given his note for the premium on the policy, and that it was in the hands of attorneys, and he wanted to know if he (witness) could raise the money for him to lift the note; and that he (witness) told him that he could not at that time; and that his father then said, "'I believe I will go to the bank and get the policy, and see if I can mortgage it for the money to pay the note,'—mortgage it to parties there, to see if he could get the money to lift his note with."

It is unnecessary to refer further to evidence in the case, as that already stated presents, for the most part, the only question at issue, viz. whether the contract of insurance was consummated on November 20, 1893.

Fenton, Bronaugh & Muir, for plaintiff in error.

Allen & Allen and John H. Powell, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The assignments of error are 32 in number. The errors claimed relate to admission and rejection of evidence, refusal to instruct the jury to bring in a verdict for the defendant, refusal to charge the jury as requested by plaintiff in error, defendant in the court below, and exceptions taken to certain parts of the charge as given. It will be necessary to consider first the alleged errors in admitting or rejecting evidence. If the court below committed a material error either in the admission or rejection of evidence, it follows that the judgment must be reversed, and a new trial ordered.

One of the assignments of error raises the question whether or not the court erred in permitting the witness Lysander S. Logan, the plaintiff in the court below, to answer the following question: "Q. Now, Mr. Logan, did you, subsequent to November, 1893, and, if so, when, have a conversation with Mr. Thomas J. Logan regarding this policy and this note?" To which the witness answered as follows: "A. I had a conversation with my father about the first of December, the early part of December, regarding the note and policy. He told me that he had given his note for the premium on this policy, and it was in the hands of attorneys, and he wanted to know if I could raise the money for him to lift his note; and I told him I could not at that time, and he says, 'I believe I will go to the bank, and get the policy, and see if I can mortgage it for the money to pay the note,'—mortgage it to parties there, to see if he could get the money to lift his note with." In the offer to prove this conversation, the following colloquy occurred between counsel and court. Counsel for defendant in error said: "I desire to prove by this witness that Thomas J. Logan stated to him that he knew that the policy was in the bank, and that he could go and get it whenever he wanted it. That was subsequent to

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November 20, 1893, in the early part of December, 1893, and Thomas J. Logan did say that he was going to try to get it. I offer to prove that Thomas J. Logan told this witness that the policy was there; that he could go there, and get it; that the attorney was after him for this note; that he was going to go to one Maley, and borrow the money if he could; if Maley would lend him the money, he was going to mortgage the policy to Maley to secure payment." Whereupon the court said: "Have you examined to see whether this kind of testimony was admissible under any circumstances?" Whereupon counsel for plaintiff said: "I took it for granted it was, if your honor pleases." To which the court replied: "If it is a part of the transaction, it is entitled to come in. I think this testimony had better come in subject to your objection, giving counsel and myself an opportunity to consider the question at a later date in the course of the trial." Whereupon counsel for the defendant inquired: "You mean both conversations?" To which the court replied: "No; I am not speaking of the other conversation. I am quite clear as to the other conversation, but as to this transaction, this matter, that seems to be in the nature of an act endeavoring to borrow money." Whereupon counsel for defendant excepted, on the ground that it was incompetent and immaterial. The court then said: "I will allow this testimony subject to the objection. I will endeavor to give the jury such directions as I think the case warrants." As stated above, it does not appear that the court, in its instructions to the jury, again referred to this matter.

We are of the opinion that the admission of this testimony as to the conversation the witness had had with his father at a time subsequent to November 20, 1893, when the alleged delivery of the policy took place, was incompetent and self-serving testimony to show that Thomas J. Logan had accepted and thereby completed the delivery of the policy. In the first place, it was clearly hearsay testimony. The only way in which such testimony would have been admissible, the declarant being dead, was a declaration against interest. But it does not appear to have been offered as such, although the claim is not made that it would have been competent for that purpose. The conversation cannot, however, be regarded as constituting a declaration against interest, for it was plainly intended as, and its inevitable effect was that of, self-serving testimony. It is contended that it was, substantially, a declaration against interest, because Logan admitted his liability upon the note, by endeavoring to raise funds to pay it; but it must be observed that, while the statements indicating an admission of liability upon the note would have been properly admissible in an action on the note against Logan or his estate, the present suit is not brought to enforce a liability against him on the note, but is brought by his executor, who is also one of his heirs and legatees under the will, to enforce a liability against the company upon the policy, in which one of the chief questions of fact for the determination of the jury is whether or not the policy was delivered to, and accepted by, Thomas J. Logan. The court below, however, evi-

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dently considered it as part of the res gestæ, and admitted it as such. But it is difficult to see how this conversation could be admitted as a part of the res gestæ. It took place, according to the witness, about the first part of December, 1893, although the witness does not remember exactly when it occurred. This was at least some 10 days after November 20, 1893, when the alleged delivery of the policy took place. A declaration, to be admissible as part of the res gestæ, must be contemporaneous with it, and so limit, explain, or characterize the fact it assists to constitute as to be in a just sense a part of it, and necessary to its complete understanding. 1 Greenl. Ev. § 110; Whart. Ev. § 259. That the conversation held between Logan, the plaintiff in the court below, and his father, and the statements made by the father in the course of such conversation, are not necessary incidents of the litigated act,—that is, whether the contract of insurance was consummated by a delivery of the policy on November 20, 1893,—is too clear for argument. The admission of this testimony must have had some effect on the jury, and, in our opinion, was material error.

The next question for our consideration is whether the court below erred in refusing to instruct the jury to bring in a verdict in favor of the defendant, plaintiff in error here. This alleged error is covered by assignment No. 1. As stated, the only issue in the case was whether the contract of insurance had been consummated. Three questions of fact may be said to arise under this issue: (1) Did Stinson have the authority to take a note in payment of the premium for the policy? (2) Did he, in fact, take the note in payment of the premium? (3) Was there a delivery of the policy to Logan? So far as these questions involve matters of fact, it was, undoubtedly, for the jury to determine them. Smith v. Assurance Soc., 13 C. C. A. 284, 65 Fed. 765. Their verdict, subject to the law as given by the court, is conclusive on this court, especially as the evidence may be said to be contradictory and conflicting. We think there was sufficient evidence to go to the jury, even excluding the evidence which we think the court below improperly admitted. It may not be of the strongest and most satisfactory character, but still it was sufficient to justify the jury in passing its judgment thereon. Upon the question of delivery, the case depended very much upon the credence given by the jury to the testimony of Baldwin, the cashier of the First National Bank of Prineville, Or., and an intimate friend of the deceased Logan.

Upon the question of law whether or not the taking of a note constitutes a payment, it is well settled by the weight of authority that an agent of a life company, who is intrusted with the business of closing the contract by delivering the policy, has an implied authority to determine how the premium then due shall be paid, whether in cash, or, as is sometimes done, by giving credit, in which case the agent becomes the creditor of the insured, and the debtor of the insurer. In that event, though the agent should subsequently default, and the premium should never reach the company, the policy would still be binding. Richards, Ins. (2d Ed.) § 93; Miller v. Insurance Co., 12 Wall. 285; Ball & S. Wagon Co.

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v. Aurora F. & M. Ins. Co., 20 Fed. 235; Smith v. Assurance Soc., 13 C. C. A. 284, 65 Fed. 765. The authorities cited by plaintiff in error are not inconsistent with this rule. While the rule itself is well settled, still an agent must have the authority, either actual or apparent, to take notes in payment of premiums, or the course of business of the company must be such as to warrant an implication of authority. Insurance Co. v. Willets, 24 Mich. 268. Whether or not Stinson possessed this authority, either actually or ostensibly, was, as has been stated, a question of fact. It appeared, on the one hand, that Stinson had made it a practice of taking notes in payment of premiums, and that the general agents knew this; that they acquiesced in this method of receiving payment, making no serious objection beyond admonishing Stinson to be cautious, as he might involve himself too heavily. On the other hand, Mr. Forbes, one of the general agents, directly contradicted this evidence. It was for the jury to pass upon this conflicting evidence.

It is, however, further contended that Stinson was prohibited by a rule of the company from taking notes. Stinson, in his testimony, made some claim that he was not aware of such a rule; but, however that may be, assuming for the purposes of the case that he did not know of the rule, the fact remains that there was evidence tending to show that the company knew of his frequent violations of the rule, and that it made no objection thereto, beyond advising Stinson to be cautious, as he might involve himself too heavily. It is not claimed that the insured knew of this rule. He cannot be prejudiced in his rights by the failure of Stinson, on the one hand, to observe a rule of the company, and of the company, on the other hand, to enforce the rule. It must be deemed that the company, through its general agent, waived the application of the rule in this case. Insurance Co. v. Norton, 96 U. S. 234; Insurance Co. v. Carder, 42 U. S. App. 659, 665, 27 C. C. A. 344, and 82 Fed. 986.

We now come to consider the charge of the court to the jury, and its refusal to charge as requested by the plaintiff in error. The court refused to give the following instruction:

"The fact, if it be a fact, that plaintiff, as executor of the estate of T. J. Logan, may have allowed the note as a claim against the estate, and in favor of the National Bank of Commerce, cannot be considered by you. Such action by the executor, if taken, cannot bind the insurance company or add anything to the rights of the plaintiff in this case."

This, in our opinion, was error. The only issue before the jury was whether or not the contract of insurance was consummated on November 20, 1893. The mere fact that, long subsequent thereto, the note was allowed as a claim against the estate, cannot be deemed to bind the plaintiff in error in any way, the note not having been presented on behalf of the insurance company. If the contract of insurance was never consummated, if Logan never accepted the policy, the fact that the note, which at the outset he had given to Stinson, was allowed as a claim against his estate, cannot bind the insurance company, nor add anything to the rights

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of the plaintiff. We think that the instruction requested should have been given, in view of the evidence presented in the case.

The court, in its charge, instructed the jury as follows:

"Now, in determining what was done, or what Logan said or did, you must take the testimony of witnesses as to what Logan did or said, and not consider the statements contained in the letters that passed from Baldwin to Stinson."

In objecting to this instruction, the following colloquy occurred between the court and counsel for the plaintiff in error:

"Judge McArthur: We also except to your honor's instruction to the jury that the statements in the letters are not to be considered by them as evidence. The letters of Baldwin to Stinson are not to be considered as evidence in the case."

Whereupon the court, in response to said objection, and before the jury retired, said:

"I do not wish to be understood in that way. I say the statements in the letters of Baldwin to Stinson as to what Logan did are not to be considered, but, instead, Baldwin's testimony as to what Logan did and said; that they may consider that rather than the statements of Baldwin in his letters as to what Logan said."

Whereupon counsel for defendant replied to the court, in the presence of the jury:

"Yes, I understand the court to draw the distinction between the statement in the letter and the statement under oath as evidence; but we consider that the statement in the letter is simply a verbal act, and is the best evidence of what was done, coming so recently after the statements said to have been made by Logan, and are receivable in evidence, and should have full force and effect as a verbal act."

This part of the charge was clearly error. The jury were told, in effect, that they should consider the testimony of Baldwin in preference to the statements made by him, and contained in his letters to Stinson. But it was for the jury to say which of the statements they preferred to accept. It was for them to pass upon the credibility of Baldwin's testimony. They might have considered that the statements contained in his letters to Stinson written at the time were preferable and more truthful than his subsequent testimony. The significance of this is seen in the fact that in the letters Baldwin stated that Logan refused to take the policy, while in his testimony he swore that Logan never absolutely refused to take the policy, and that, furthermore, he never directed him (Baldwin) to return the policy. This variance was matter for the jury to consider and judge. It may be that the learned judge felt justified in believing that the testimony of Baldwin was entitled to more credence than the statements contained in his letters to Stinson; but the instruction was couched in such language that it may well be that the jury considered they were bound to give more weight to Baldwin's testimony than to his statements in the letters. The court should have been careful to distinguish the law from the facts. See Starr v. U. S., 153 U. S. 614, 14 Sup. Ct. 919.

The remaining assignments of error do not, in our opinion, show any error committed by the court in its other instructions to the jury. For the reasons stated above, the judgment will be reversed, and the cause remanded for a new trial.

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(87 Fed. 648.)

NORTHERN PAC. R. CO. v. MURRAY.

(Circuit Court of Appeals, Ninth Circuit. May 9, 1898.)

No. 372.

1. RAILROAD RIGHT OF WAY—DEFINITE LOCATION OF NORTHERN PACIFIC—RIGHTS OF SETTLERS.
   Act July 2, 1864, § 3, makes the grant to the Northern Pacific Railroad Company definite, taking effect from the date of the act, when the line of road is definitely fixed by the company, and a plat thereof filed in the general land office. *Held* that, when the company thus signified its location of any portion of its line, it was concluded thereby, and, if it afterwards constructed its road on a different line, it must procure a right of way by purchase or condemnation proceedings, where private rights had intervened.
2. SAME—LIABILITY FOR COMPENSATION—TRANSFER OF LAND.
   The liability of a railroad company to make compensation for land taken for right of way is to the owner of the land at the time of the taking, and a subsequent vendee has no right of action unless the same is specially assigned to him.
3. SAME—ENTRY WITHOUT RIGHT—ACQUIESCENCE OF OWNER—REMEDY.
   Where a landowner, knowing that a railroad company has entered upon his land and is constructing its road without having procured the right of way, remains inactive until the road is in operation, he cannot maintain ejectment for the entry, but is restricted to an action for damages.
4. SAME—AMENDMENT OF COMPLAINT—WAIVER OF EXCEPTION.
   Plaintiff brought ejectment against defendant railroad company for land upon which it had wrongfully entered and constructed its road. The court decided that the action would not lie, but, upon plaintiff's request, permitted him to file an amended complaint for damages only. *Held* that, by electing to amend, plaintiff waived his right to a review of the question as to his right to maintain the action in its original form, and was not aided by a stipulation agreeing that such question should be submitted to the court of appeals.

In Error to the Circuit Court of the United States for the Western Division of the District of Washington.

This was an action by David Murray against the Northern Pacific Railroad Company to recover for land taken for a right of way. Judgment below was given for plaintiff, and defendant brings error.

Crowley & Grosscup, for plaintiff in error.

Parsons, Parsons & Parsons and Carroll B. Graves, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and BELLINGER, District Judge.

BELLINGER, District Judge. This action grows out of the construction and maintenance by the Northern Pacific Railroad Company of its branch line from Yakima to Swank Creek, in the state of Washington, upon lands claimed by the defendant in error. By section 2 of the act of congress of July 2, 1864, creating the Northern Pacific Railroad Company, it is provided as follows:

"Sec. 2. * * * the right of way through the public lands be and the same is hereby granted to said Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as pro-

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posed; and the right, power and authority is hereby given to said corporation to take from the public land adjacent to the line of said road, material of earth, stone, timber and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain."

At the date of the passage of this act the lands in dispute were unoccupied public lands of the United States. On May 10, 1884, the railroad company definitely located its branch line of road from Yakima to Swank Creek, and on May 24th filed a plat of such location in the office of the commissioner of the general land office, which was approved by the secretary of the interior; and on January 8, 1885, the lands so located were withdrawn from sale. Subsequent to the grant, and prior to the definite location of the line of road, on July 5, 1873, one Frederick Ludi received a patent for a portion of the tract including the land now used for right of way by the company, in accordance with steps theretofore taken by him to that end; and on June 5, 1873, one William Berry in like manner received a patent for the tract which includes the remaining portion of the lands in dispute. The defendant in error succeeded to these titles in 1888, through one Smith, grantee of Ludi and Berry. In the year 1886 the railroad company built its road on the lands in dispute, and has since maintained and operated it there. But the line so constructed and maintained is not upon the line as definitely located in 1884. It is conceded that a definite location of a line of road takes effect, as to the right of way, by relation from the date of the grant.

The first question to be considered is whether the grant of right of way is fixed by the location of the road as constructed, without reference to variations of such location from that shown by maps filed in the land office by the grantee company. If so, the company has a right of way, effective by relation from July 2, 1864, the date of the granting act, and has priority over the title under which the defendant in error claims. By section 3 of the granting act, the grant becomes definite when the line of road is definitely fixed, and a plat thereof is filed in the office of the commissioner of the general land office, so that the limits of the grant become fixed when the line of route is thus located. In this case such line was established by a map of definite location filed in May, 1884, nearly 20 years after the granting act was passed. It is undisputed that the right of way, as thus ascertained, was vested in the company as of the date of the act of congress, and it does not follow the line of construction where that deviates from the line of such location. Smith v. Railroad Co., 7 C. C. A. 397, 58 Fed. 513. It is conceded that the route must be considered as definitely fixed when its map of location is filed, upon the authority of decisions of the supreme court of the United States, where the question related to the limits of land grants, but it is sought to distinguish the question thus presented from that arising in this case. As to this, the circuit court of appeals for the Eighth circuit, in the case cited, says:

"But it is not perceived how the line of this railroad can be consistently held to be definitely and unalterably fixed, under the act of congress, by filing its map of definite location, and yet be subject to another and subsequent definite fixing, on a different line, by its actual construction; for this is

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simply to say that a line which is 'definitely fixed' is indefinitely changeable. Nor is it perceived how this act of congress can be held to give the company the power to select and definitely fix one line of railroad for the purposes of its land grant, and another and a parallel line for the purposes of its right of way."

Every consideration upon which the land-grant companies are held to the lines of location designated in maps filed for that purpose by them, when the question was with reference to the grant of lands, applies equally in cases involving rights of way. The company makes its own selection of route, and it takes its own time in doing so. It is not concluded by any survey and selection it may make. As stated by the court in Land Co. v. Griffey, 143 U. S. 32, 12 Sup. Ct. 362:

"It may survey and stake many, and finally determine the line upon which it will build by a comparison of the cost and advantages of each; and only when, by filing its map, it has communicated to the government knowledge of its selected line, is it concluded by its action."

It is argued in this case that there is nothing in the act of congress that required the company to file a map of definite location; that the failure to do so simply had the effect to extend the time within which interests in lands within the limits of the grant might vest in others. This may be true, and, if so, it was open to the company not to signify its location of route by this method. It might have indicated its route by the construction of its road. But by whatever means it chose, if it had choice of methods, to signify its adoption of a line of route, when it had formally announced its selection the limits of its grant became fixed for all purposes. The case of Smith v. Railroad Co. also holds that the report of the railroad commissioners that the road was completed according to the requirements of the act of congress does not operate as a judicial determination of the company's title to the right of way occupied by it. It clearly was not a function of the commission to determine anything but the practical question whether the road was well and serviceably built. But, if the right of way is not subject to change, it does not follow that the company may not abandon the right of way, so long as private rights are not affected, and purchase another, by the method of condemnation or otherwise. There is no reason why it may not surrender the right conferred upon it if it sees fit to do so,—why it should be less free to change its route than it would be if the government had not favored it in this respect. It is well settled that a railroad company seeking to condemn a right of way may, after the assessment of damages, change the location of its road. 1 Rorer, R. R. 326; State v. Graves, 19 Md. 351. And it may do this without the payment of the damages assessed, so long as it has not taken possession of the right condemned.

Defendant in error asks especial consideration for the case of Moorhead v. Railroad Co., 17 Ohio, 349. That case involved the question whether a railroad company, under a charter which authorized it "to vary the route and change the location after the first selection had been made, whenever a better and cheaper route could be had, or whenever any obstacle to continue said location was

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found," etc., could relocate its road on distinct ground after having once located and constructed it. The court held that the power to change the road was not intended to be a continuing power, that "might be exercised and re-exercised again and again, as often as might suit the convenience of the company"; that "the completion of the road upon the route first located exhausted all the power of the company"; that the right to change must be exercised before the road is built. The statute having provided in what cases a located line might be changed, the conclusion was unavoidable that changes not within the statute were unauthorized. The right to change the line once located was not involved; the sole question being whether, under the statute, the road when once built, could be changed. The railroad company, therefore, having the power of eminent domain when it entered upon the land in question and built its road, its liability to make compensation for the taking is to the grantor of the defendant in error,—to the owner whose land was taken. The question is decided by the supreme court of the United States in Roberts v. Railroad Co., 158 U. S. 10, 15 Sup. Ct. 758. The court says:

"It is well settled that where a railroad company, having the power of eminent domain, has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner of such lands, a subsequent vendee of the latter takes the land subject to the burthen of the railroad; and the right to payment from the railroad company, if it entered by virtue of an agreement to pay, or to damages, if the entry was unauthorized, belongs to the owner at the time the railroad company took possession."

The court refers to a number of cases where it is held that claims for damages in such cases were personal to the owner "when the injury occurred,—that they did not run with the land, nor pass by a deed, though not reserved," "unless expressly conveyed therein." Without deciding the further question as to the remedy available to the owner at the time of the entry and taking, the court goes on to say:

"So, too, it has been frequently held that if a landowner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute, requiring either payment by agreement or proceedings to condemn, remains inactive, and permits them to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and be restricted to a suit for damages."

It appears from the complaint, and from the stipulation of facts in the case, that the railroad company entered upon the land in question and built its road in March, 1886, "wrongfully and without the consent" of the then owner; that the road has since been maintained and operated; and that in May, 1888, the plaintiff, presumably with knowledge of the occupation and use by the railroad, purchased the land, and became, and has since been, the owner in fee. This cause of action existed in favor of plaintiff's grantor more than two years before plaintiff made his purchase. It is not claimed that this right was assigned to plaintiff, unless the conveyance of the fee of the land had that effect; but, as we have seen, the conveyance did not have that effect.

When the trial of this case in the court below was begun, the complaint of the defendant in error was to recover the possession

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of the land which is the subject of controversy, and for damages. During the trial, upon a motion for nonsuit by the defendant company, the court announced that the action could not be maintained in the form in which it then was, and that, unless an application for leave to amend was made and allowed, the motion for nonsuit would be granted. Thereupon the defendant in error made application for leave to file his second amended complaint, which motion was allowed, and the complaint in its present form was filed. The defendant in error excepted to the ruling of the court to the effect that ejectment would not lie, and he now requests a review of this ruling, in the event of a reversal by this court of the judgment in his favor; and to this end he relies upon a stipulation by which "it is stipulated and agreed that plaintiff's exceptions upon the trial to the rulings of the court, as shown by the transcript upon defendant's writ of error, may be considered upon the hearing in the circuit court of appeals with the same force and effect as if a writ of error had been allowed upon plaintiff's part, and duly certified by the court upon the trial." The decision already announced is decisive of the question. Moreover, the objection was waived by the defendant in error, by his election to amend his complaint and proceed as he has done. It was open to him to have stood upon his right to proceed in ejectment, or to adopt the course he has taken. He was at liberty to take one of two roads, but not both; nor can he at the same time accept and reject the judgment under review. It follows that the judgment of the court below should be reversed, and the case remanded for further proceedings in accordance with this opinion.

(87 Fed. 652.)

THE BRANDYWINE.

(Circuit Court of Appeals, Fourth Circuit. May 3 1898.)

No. 258.

1. ADMIRALTY APPEALS—FINDINGS OF COURT BELOW.
   The circuit courts of appeals, in reviewing admiralty cases, are not limited to questions of law; but it is the settled practice of these courts to give great weight to the conclusions of fact by the trial judge, unless they are based on evidence manifestly insufficient, and in cases of conflicting testimony, apparently of equal merit, to follow the conclusions reached below.
2. SALVAGE—AMOUNT OF COMPENSATION.
   An award of $500 upon a salved value of $1,522.50 *held* excessive for services rendered by the first to arrive and most efficient of a number of tugs which pumped water into a burning barge; the time occupied being about 6½ hours, and there being no danger to life or property. The award should be reduced on appeal to $250.

Appeal from the District Court of the United States for the Eastern District of Virginia.

Robert M. Hughes, for appellant.
T. S. Garnett, for appellee.

SIMONTON, Circuit Judge. This is an appeal from a decree of the district court of the United States for the Eastern district of

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Virginia. It is a case of salvage. The barge Brandywine, on the morning of 20th April, 1897, was lying at the pier of Lambert's Point, near Norfolk. She was a large barge, some 190 feet in length, drawing when loaded 23½ feet, engaged in carrying coal, and with a capacity of about 1,800 tons of coal. She had two decks. She had no propelling power of her own, but was equipped with an engine used in the hoisting apparatus. This engine was forward in the between decks, in the forward part of the deck, in an engine room the whole width of the vessel, about 30 feet from the stem, back where the bulkhead comes. The engine room was entered by what was called the "companion way hatch," not the "fore hatch." The crew of the barge consisted of four men. Between 4 and 5 o'clock of this morning, the master of the barge was aroused from sleep by the call of a watchman on the pier that the barge was on fire. Calling his men, he got out, and found the fire was in the engine room, and getting some assistance from the crew of a four-mast schooner near, he began to get the fire hose from the pier aboard his barge, and to put it in the hatch of the companion way. Just at that time, the tug, Emma Kate Ross, which was lying some distance off the pier with scows in tow, discovered the fire, and leaving her scows at anchor, went at once to the Brandywine. Placing her bow opposite the bow of the barge, she put on two streams of water, one from a pipe on her own bow, the other from the deck of a pile driver alongside of her. Her deck was 10 feet below the deck of the barge, and the deck of the pile driver about on a level with the barge's deck. The Emma Kate Ross is a large tug, equipped with a powerful fire apparatus, her pump having the capacity of 6,000 gallons a minute. With these two streams she played water on the barge, chiefly on her deck and bow. After the Ross had been at the barge about a half or three-quarters of an hour, another tug, the Little Nell, came to the assistance of the latter, and began pumping water into her, followed in rapid succession by the Pocahontas, Louisa, Alvah Clark, and E. B. McCauly, all tugs more or less suitably equipped for extinguishing fires, but none as well equipped as the Ross. For some time no men from the Ross went aboard the barge. But, after men from one or more of the other tugs boarded the barge, the master and crew of the Ross did so also. The testimony is very conflicting as to the amount and effectiveness of the assistance rendered to the barge by the Emma Kate Ross. She stood by the barge as long as she was at the pier, pumping water on and into her. About 9 o'clock two of the other tugs towed her away to some flats near. The Ross accompanied them, and, as soon as they reached the flats, rendered efficient service in turning the head of the barge to the wind. But the witnesses differ very much in their testimony upon the point who put out the fire. The court below, although no specific findings of fact are given, evidently solved this conflict in favor of the Emma K. Ross, by awarding her $500 as a salvage award.

This court is not limited, as the supreme court was under act of 1875, to the review of questions of law only in an admiralty appeal. It can also review the findings of facts. The Havilah, 1 U. S. App. 1, 1 C. C. A. 77, and 48 Fed. 684; The State of California, 7 U. S. App. 20,

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1 C. C. A. 224, and 49 Fed. 172; The Philadelphian, 21 U. S. App. 90, 9 C. C. A. 54, and 60 Fed. 423. Yet it is now the settled practice of this court to give great weight to the conclusions of fact by the trial judge, unless they are based upon evidence manifestly insufficient, and in cases of conflicting testimony, apparently of equal merit, to follow the conclusions reached below. The Wilhelm, 16 U. S. App. 356, 8 C. C. A. 72, and 59 Fed. 169; The Alejando, 15 U. S. App. 98, 6 C. C. A. 54, and 56 Fed. 621; The Lucy, 20 C. C. A. 660, 74 Fed. 572. In subsequent discussion of this case, we assume that the services rendered by the Emma K. Ross were salvage services of meritorious character; and the only remaining question is as to the amount of the award.

The barge Brandywine, after the fire was extinguished, was sold at auction, her owners being present, and was bought by a third person for $1,522.50. This is the gross value of the salved property to her owner, and the award must be ascertained with this sum as a factor. As has been seen, the district court awarded to the Emma K. Ross alone $500, a third of this sum. The services of the other tugs do not seem to have entered into the estimate. We think this allowance excessive. The services of the Emma K. Ross had some of the elements of salvage service,—promptness and efficiency. They had no element of danger to life or property. Nor were they rendered to a vessel hopeless of aid from any other quarter than the salving vessel. Nor were they rendered alone. The other tugs were with her, rendering aid, if not as effective as that rendered by the Ross, certainly contributing materially in making her assistance successful. The capacity and efficiency of those other tugs are demonstrated by the fact that after the Emma K. Ross had left the barge, the fire being absolutely to all appearance subdued, it broke out afresh, and they were without her aid able to extinguish it entirely. For their services their owners are content with $50 each. The Emma K. Ross was at work from 4:30 a. m. to 11 a. m.; the Little Nell from about 5 a. m. to about 3 p. m.; and the other tugs left about an hour before her. The cases in this circuit of salvage for rescue from fire are very few. The Alice Minot, 30 Fed. 212, was a case in which a cotton vessel afire was towed by a tug into deep water, away from her wharf, and was there sunk by her crew who scuttled her. The court of the Eastern district of Virginia awarded the tug for salvage $500. In that case the value of the property saved was $72,000. In The Cherokee, 31 Fed. 167, a steamship of the Clyde Line, with a full cargo, was found to be afire very soon after leaving her dock. The tug Monarch went to her rescue, began pumping on her with powerful pumps, and towed her afire to her wharf. Then the fire department took charge of her, and extinguished the flames. The district court for the district of South Carolina awarded $850 for the salvage service. The property at peril was valued at $272,500. The S. B. Baker, 23 Fed. 109, decided by the district court for the Southern district of New York, is a case which somewhat resembles the case at bar. A fire broke out during a westerly gale among the cotton bales which composed the cargo of the lighter Baker. Upon a signal from the superintendent of the wharves, a tug towed her out, with her burning cargo, from

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the slip into the river, and played upon the fire with her small hose until the arrival of two city fire department tugs. The tug then towed the three vessels (the lighter and two steam fire department tugs) to a place convenient for taking out the burning cotton. The value of the cotton saved was $20,000; of the lighter, $3,000; and of the tug, $14,000. Held, that $750 was a proper salvage award. This award was reduced on appeal in the circuit court to $350. It is true that new evidence in the higher court influenced this reduction. It is evident, however, that the court thought that the award of the district court, without this new evidence, was high enough. See, also, The Alice Clark, 39 Fed. 621. In the light of these cases, and taking into consideration the number of tugs actively engaged in the same work and at the same time with the Emma K. Ross, we think that $250 is a liberal reward to her for her salvage services on that occasion. Let the case be remanded to the district court, with instruction to modify its decree in reducing the salvage award to this sum of $250.

(87 Fed. 669.)

HARRISBURG TRUST CO. v. SHUFELDT.

(Circuit Court of Appeals, Ninth Circuit. May 23, 1898.)

No. 388.

1. SET-OFF—NEGOTIABLE INSTRUMENTS.
   The right to set-off is wholly statutory, and under 2 Hill's Code Wash. § 806, when a party is sued by the assignee of a chose in action, he cannot plead against the assignee a set-off which he holds against the assignor unless the demand sought to be set off existed at the time of the assignment, and belonged to the party in good faith before notice of such assignment.
2. NEGOTIABLE INSTRUMENTS—UNINDORSED NOTES—EQUITABLE TITLES.
   The assignee of an unindorsed negotiable note takes only an equitable title, but the note then stands on the same footing as nonnegotiable paper, and he may, under the Washington Code, maintain in his own name an action against the maker.
3. SAME—SET-OFF—DEFENSES.
   The fact that a note is transferred without indorsement is sufficient to put the transferee upon inquiry as to all equitable defenses that existed at the time of the transfer; but a "set-off" is not a defense, as that term is ordinarily used, whether the title to the note be equitable or legal, and is never pleadable as a defense unless expressly made so by statute.

In Error to the Circuit Court of the United States for the Northern Division of the District of Washington.

Strudwick & Peters, for plaintiff in error.
Hastings & Stedman, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and BELLINGER, District Judge.

GILBERT, Circuit Judge. The Harrisburg Trust Company brought an action in the circuit court to recover upon a promissory note for $3,000 made on March 31, 1894, by the defendant in error, in favor of the Guarantee Loan & Trust Company, payable on demand, with interest at the rate of 10 per cent. per annum, which note

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was on July 16, 1894, sold and delivered to the plaintiff in the action. In his answer to the complaint the defendant in error set forth an affirmative defense, which was, in substance, as follows: That the note was never indorsed by the payee; that it was delivered to the plaintiff, or to one Edward L. Bailey, an officer thereof, together with other negotiable paper, as a pledge to secure the repayment of an advancement made by the said Bailey, individually, or as an officer of the plaintiff; that said note bears no indorsement save a credit of interest and $500 on account of the principal; that on May 23, 1896, there was standing to the credit of the defendant with the said Guarantee Loan & Trust Company the sum of $2,092.80, and on said day the Guarantee Loan & Trust Company certified a certain check, purporting to be drawn by the defendant, payable to the order of the county treasurer, in the sum of $2,085.30, which check was not accepted by the county treasurer, but has remained and is the property of the defendant; that on October 3, 1896, the defendant demanded from the Guarantee Loan & Trust Company the delivery of said note, and tendered in payment thereof the said certified check, a receipt for a general deposit of $7.50, and the sum of $454.41 in cash, which tender was refused; that the said note was received by the pledgee thereof without the defendant's knowledge or consent, and that the plaintiff acquired no right or title to said note "other than that then and since held by the Guarantee Loan & Trust Company;" that the Guarantee Loan & Trust Company made an assignment on May 25, 1896, for the benefit of its creditors, and that until subsequent to said assignment the defendant had no knowledge that any person other than the payee held the note, and that when the payments were made on account of principal and interest the note was in the possession of the payee thereof. To this affirmative defense the plaintiff demurred, and its demurrer was overruled, the court holding that the matters set forth in the answer were sufficient in law to constitute a set-off to the action, to the extent of the amount represented by the said certified check. The question presented upon the writ of error to this court is whether or not the court erred in so ruling.

The right to set-off is wholly statutory, and in this case its existence and its definition must depend upon the provisions of the statutes of the state of Washington. The Code of Washington (2 Hill's Code, § 806) provides as follows:

"Sec. 806. The defendant in a civil action upon a contract expressed or implied may set off any demand of a like nature against the plaintiff in interest which existed and belonged to him at the time of the commencement of the suit. And in all such actions, other than upon a negotiable promissory note or bill of exchange negotiated in good faith, and without notice before due, which has been assigned to the plaintiff, he may also set off a demand of a like nature existing against the person to whom he was originally liable, or any assignee prior to the plaintiff of such contract, provided such demand existed at the time of the assignment thereof, and belonging to the defendant in good faith before notice of such assignment, and was such a demand as might have been set off against such person to whom he was originally liable, or such assignee while the contract belonged to him."

This statute is clear and explicit, and requires no interpretation. When a defendant is sued by an assignee of a chose in action, he can-

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not plead against the assignee a set-off which he holds against the assignor, unless the demand sought to be set off existed at the time of the assignment, and belonged to the defendant in good faith, before notice of such assignment. A similar statute is found in the state of New York, and it has there been held that the demand which constitutes the set-off must be one which existed against the assignor at the time when he made the assignment. Martin v. Kunzmuller, 37 N. Y. 396; Faulkner v. Swart, 55 Hun, 261, 8 N. Y. Supp. 239; Brisban v. Caines, 10 Johns. 45. So far as the record in the present case informs us, the account of the defendant in error as a depositor with the Guarantee Loan & Trust Company did not exist prior to May 23, 1896, which was nearly two years subsequent to the transfer of the note to the plaintiff in error. By the terms of the statute, therefore, the certified check and the amount represented thereby, upon deposit with the Guarantee Loan & Trust Company, cannot be pleaded as a set-off to the note, unless there are other facts in the case which are sufficient to take it out of the statutory provision. It is contended by the defendant in error that the fact that the note was transferred without indorsement renders the statute inapplicable, and that the delivery of the note, in pledge for money borrowed, conveyed to the transferee thereof only an equitable title to the note, and that in an action on such a note delivered after maturity, especially in a case in which the maker of the note had no notice of the transfer, the latter may avail himself of all the equitable defenses which he possesses. There can be no doubt of the correctness of the latter proposition. The pledgee or assignee of a note which has been delivered to him without the indorsement of the payee takes only an equitable title to the note, but as such equitable owner he may undoubtedly, under the Washington Code, maintain in his own name an action against the maker. The note in the hands of such a holder stands upon the same footing as nonnegotiable paper. Simpson v. Hall, 47 Conn. 417. The fact that it is transferred without indorsement is sufficient to put the transferee upon inquiry as to all equitable defenses that existed at the time of the transfer. But a set-off is not a "defense," as that term is ordinarily used (Chandler v. Drew, 6 N. H. 469; Wat. Set-Off, §§ 5, 6), and is never pleadable as a defense unless it is expressly made so by statute. "The rule that a party taking an overdue bill or note takes it subject to the equities to which the transferer is subject does not extend so far as to admit set-offs which might be available against the transferer. A set-off is not an equity, and the general rule stated is qualified and restricted to those equities arising out of the bill or note transaction itself, and the transferee is not subject to a set-off which would be good against the transferer arising out of collateral matter." 2 Daniel, Neg. Inst. 1435a; Chit. Bills (13th Am. Ed.) 251. The set-off in this case is not connected with the note, or with the consideration for the note, or the circumstances under which it was given. It is not a defense to the note or to liability thereunder. It is a separate and independent cause of action, existing in favor of the defendant, which, by virtue of the statute only, is permitted to be set off against the plaintiff's debt for the purpose of adjusting mu-

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tual demands and avoiding unnecessary litigation. It follows, therefore, that it is immaterial whether the plaintiff's title to the note was equitable or legal. In either case, the right to plead a set-off against it must depend upon the terms of the statute. The judgment of the circuit court is reversed, and the cause will be remanded for further proceedings not inconsistent with these views.

(87 Fed. 682.)

ASHENFELTER v. EMPLOYERS' LIABILITY ASSUR. CORP., LIMITED, OF LONDON, ENGLAND.

(Circuit Court of Appeals, Ninth Circuit. May 9, 1898.)

No. 415.

1. ACCIDENT INSURANCE—EXCEPTING CLAUSES.
   Under an accident policy excepting from the risks "voluntary exposure to unnecessary danger," an accident is not within the exception unless the insured was aware of the danger he incurred, and purposely assumed the risks thereof.
2. SAME—QUESTION FOR JURY.
   Whether a contractor, who was suffocated or burned to death by the ignition of a bucket of tar pitch which he was heating inside a tank for calking purposes, was aware of the danger arising from the character of that material, so as to bring him within the exception of "voluntary exposure to unnecessary danger," contained in his accident policy, *held*, on the evidence, to be a question which should have been submitted to the jury.

In Error to the Circuit Court of the United States for the Eastern Division of the District of Washington.

This was an action by Lida M. Ashenfelter against the Employers' Liability Assurance Corporation, Limited, of London, England, to recover upon a policy of accident insurance. In the circuit court a verdict was directed for defendant, and judgment entered accordingly, to review which the plaintiff sued out this writ of error.

R. J. Danson and William A. Huneke, for plaintiff in error.

L. C. Gilman, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This action was brought in the court below by the plaintiff in error against the defendant in error to recover the amount of an accident insurance policy issued by it upon the life of one H. C. Ashenfelter, since deceased. The amended answer of the defendant admits the averments of the complaint in respect to its corporate existence, the issuance of the policy in consideration of the payment of the required premium, the death by accident of the insured, and the nonpayment of the amount for which the policy was issued. It denies the averment of proof of death, but that fact was admitted on the trial. The answer alleges the fact that the policy does not insure against "voluntary exposure to unnecessary danger," and further alleges that the accident by which the insured lost his

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life was caused by his voluntary exposure to unnecessary danger, and that was the real defense made at the trial. On the conclusion of the testimony, the defendant, by its counsel, moved the court to instruct the jury to return a verdict for the defendant, upon the ground that the evidence showed that the deceased lost his life by reason of having voluntarily exposed himself to unnecessary danger. The court so instructed the jury, and a verdict was returned as directed. The plaintiff duly excepted to the action of the court, and brings the case here by writ of error.

The evidence in the case shows that the deceased was a contractor of great energy and of extensive business, and, at the time of his death, was engaged in the performance of a contract with the state of Washington for the erection of buildings for its university, which were nearing completion. Among them was a large tank for the storage of water. The tank itself was 16 feet in diameter, and 17 feet high, and rested on a platform constructed upon a trestle rising 75 feet above the ground. Every ninth stay of the tank extended upward about 14 inches, and upon these stays so extended was constructed a roof having a projection of 3 feet beyond the outer edge of the tank. Through the spaces thus left, ingress and egress was had into and out of the tank by means of a ladder. The platform projected from 14 inches to several feet beyond the tank, the projection being greatest at the corners, which were square, and of which projection about 6 inches in width was occupied by a railing. For the purpose of making the tank water-tight, it became necessary to calk the seams with oakum, and to mop them with a mixture of heated pitch and tar. It was in preparing and applying that mixture that the insured lost his life. Although, as has been said, the deceased was a contractor of extensive business (the contract with the university aggregating about $117,000), the evidence shows without conflict that he was a man of such energy that, when any part of the work he had contracted for lagged, he turned his hand to it, and pushed it along, until properly under way. It was in this way that he went with a workman named Gallagher to make water-tight the tank. Gallagher and he only were in the tank at the time of the fatal accident, and Gallagher's deposition was taken on behalf of the defendant, and introduced in evidence. In answer to a question asking him to describe as briefly and accurately as he could the circumstances under which the deceased was killed, the witness said:

"We started in to work on Sunday morning. He came to me before that. Harry [deceased, Ashenfelter] spoke to me on Saturday, and he said, 'Will you come over and work to-morrow?' And I said, 'If there is anything pressing, I have no objection;' and he said it was. So, we came on over to the tank at ten o'clock. On going over there, he said, 'Have you been in the tank?' and I said, 'I have not.' He said, 'Come up and come in,' and we went up in the tank. There was about six inches of water in it, and we drained it out by boring plug holes in it, to keep the sediment from pouring down. There would be six inches of water there, and we went and bored the holes in there; and Harry said, 'We must dry this tank up, so we can see what we can do with it.' I said: 'There is a salamander over to the little observatory which I used in drying the plaster on the observatory. If you want it, Harry, you can take it.' He says: 'All right; the next thing is to get it in.' We went and measured the space, and we found it was in the neighborhood of

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fourteen inches; and we took and flatted up the salamander, so as to get it in there. So, we put the ladder up against the tank, and looked over into the tank, and Harry said, 'The only thing we can do is to calk the tank.' The seams were a little open. And I said, 'All right; we will get in and calk it.' I said, 'There is plenty of oakum over there.' I don't know but he carried the oakum, and I got some calking irons, and started in calking, till about eight o'clock. We have two lamps in the office, and we were working with them; and he went out of the tank possibly in the neighborhood of half-past seven or eight, and I followed him; and we came over to the building, and came back Monday morning, and finished the calking. Monday, about noon, I should judge, we got through with the calking of the tank. He took no part whatever in the calking of the tank. He carried the oakum to me, and I got through calking, and he got some paints from Baker & Richards, called 'paraffine paints,' supposed to be applied on tanks for to preserve it, and also to purify the water. We looked over that material, and found it to be pretty thin. It was heavy paint, but not sufficiently heavy to cover the seams in good condition; and we concluded to put pitch on the top of the seams, or on the top of the oakum, so as to make it water-proof. So, the first kettle we heated below, and it became stiff at the time we got it into the tank. He said, 'We will use that old salamander, and we will heat the tar below, and get along with it;' and we got along Monday and Tuesday, till the accident occurred. The first knowledge I had of the fatal accident was Harry hollering to me. He said, 'Frank, hold that ladder!' And I looked down below, and I seen a blaze,—very small. It was very smoky in the tank. I saw the smoke and blaze, and started down the ladder immediately, because I knew— The first impulse was that the fire could be extinguished, and knowing that there was no means of reaching the fire, and as I rushed to the bottom, it was all igniting. It was a big sheet of flame all around me, and I used the support, and moved the ladder to the opposite side, where the exit would be to the outside, and picked up the body of Mr. Ashenfelter, which was lying on the floor between me and the salamander. He was lying on the floor, and I picked him up, and tried to make the rim of the tank; but the fire had drove in on me so I couldn't make it, and I became partly suffocated, and I drew myself out of the tank, and that is the last I remember. I felt his body going from me, and I heard him strike the floor. I could not tell you any more till I got on the bottom of the platform myself."

Gallagher further testifies that the deceased was not in the tank much of the time while he was calking, but that he heated and prepared the mixture of pitch and tar, filled the buckets with it, and attended to the fire, and was so engaged at the time of the accident. The witness described the salamander as an open stove, made of about 16-gauge sheet iron, standing about 6 inches from the floor, on four legs, with air holes underneath, and with a grate, and, in the bottom, a pan to receive the ashes or coals. Near its top was a hole in each side, through which an iron pipe passed to hold the buckets. The witness further testified that he and the deceased were afraid to use charcoal because of the gas which would be formed by it, but used bark, and said, "Bark is harmless, although it will cause more smoke." The witness Gallagher further testified that, shortly before the fatal fire, another fire had occurred, and, being asked how, answered:

"A. That was occurred by a bucket of tar,—one of the buckets which contained the tar or a gallon bucket; whichever it was, I don't know. I had passed the bucket down, and he was holding it over the fire; and the flames rushed out, and caught hold of the side of the bucket, and melted off this ear which is upon the bucket. The bucket upset when the ear melted off, and the fire ran down through the bottom of the salamander on the floor; and I noticed that immediately, because I was about to hand the bucket;

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and I slipped down the ladder, and I extinguished the blaze with the Mackinaw jacket that I had on; and then, when I had extinguished the blaze, I took the five-gallon bucket out of the salamander before it caught fire, and then I threw my jacket over the fires that were on the floor. Q. Is not tar pitch, when heated that way, likely to boil up and boil over? A. Pitch itself, after it is generated, is not liable to boil as fresh tar before it is generated, before it is heated, will. Q. This accident that occurred was one that was likely to occur, this ear of the bucket being unsoldered? Is it such an accident as is likely to occur? A. Well, it is liable to occur, certainly. Q. Now, as I understand you, you were able to put out this fire by seeing it at once, and getting there very promptly, and slashing out the fire, and taking off the pitch? A. Yes, sir. Q. Had you been less prompt, that fire might also have been fatal? A. Well, I don't know. It would have surely have went under the same circumstances this last one did. I don't see how it could have been prevented. Q. Do you know how the second fire occurred, and what were the causes that induced it? A. Well, simply on account of the first fire causing from the ear melting off. I always presume, and still presume, that the second might have been caused by the same, and it might have been caused otherwise. The man might have fell."

The defendant introduced several witnesses to show that the method adopted by the deceased of heating the pitch and tar inside the tank was extremely dangerous; that the proper way, and the way adopted by those understanding the preparation and handling of the mixture, was to heat it on the ground, and convey it in buckets to the places of use; and the testimony to this effect is without conflict. But there is no testimony tending to show that the deceased knew this, or was experienced in the business of preparing or handling the mixture. On the contrary, there is a good deal of testimony tending to show that the deceased was not conscious of any particular danger. For example, the defendant called C. B. Smith as a witness, and asked him, among other things, this question:

"From your experience and your knowledge of this material and its use, would a prudent man, exercising reasonable foresight, have voluntarily done that work by heating the pitch on the inside of the tank?"

—To which the witness answered:

"My experience with contractors and people generally in applying that material (that is, coal tar or pitch) would lead me to state that it would be the most natural method that would be applied by a man that was not directly in that line of business, from the fact that they don't,—men that don't handle the material as a business, and have had experience, don't realize the danger there is in handling it. I have in many cases had people advise me to heat my material on the kitchen stove. Q. Assuming that it was being heated by a pail over a salamander, and that, once before the fatal accident, the ear had become unsoldered from the pail, and started a fire, and the pitch slopped over, and started a fire, what would you say as to whether any ordinarily prudent man, exercising reasonable foresight, would have continued to do the work in that way? A. In answering that question, I would think that a man would be apt to go at it some other way. At the same time, to a man that knows how to put out a tar fire, and it does not get the best of him, and feeling confident that he can,—why, if he had already gone through one experience, and successfully put out the fire, he might think he could do it again if occasion arose, and he would hardly think that it would occur again; but an accident is apt to occur. It is a hard matter for a man that is directly in that line of business, and a man that always uses every caution to avoid against just such accidents,—it is a hard matter for him to give an opinion as to what an inexperienced man might do in a certain set of circumstances. Q. I will ask you, as a rule, whether contractors who have had experience in building, covering a period of years, including large

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buildings, understand the nature of this article, and the danger of using it. A. My experience has been that they know—contractors know—absolutely nothing of handling this material."

Moreover, the witness James A. Johnson, introduced by the defendant, testified, among other things, that, within 10 minutes before the fatal accident, he was in the tank, and, the fire having gone out, the deceased asked him, as his own hands were covered with pitch, and he could not get his knife, to whittle some shavings, and start the fire, and, as the witness was going down to the engine house, asked him to tell the engineer to start the pumps, adding: "By the time you get down there, I will be through with this work." The witness Smith further testifies that, as he was going out of the tank, he said to the deceased that the atmosphere in there did not suit him, or that the work was more or less dangerous (not being certain as to his language), to which the deceased replied, as he remembers his reply, "We will be done in a few minutes, and there is no danger." This reply, if made, certainly tends to show that the deceased did not regard himself as exposed to danger. It is true the testimony is that, on the occasion of the first fire, the deceased stated to Gallagher that he was almost overcome by the fumes. But it also tends to show that that fire was extinguished without difficulty and without apparent harm. Of course, the case can only be properly determined by the consideration of all of the facts and circumstances properly in evidence. But we think enough has been stated and quoted to show that the jury, under appropriate instructions, should have been allowed to pass upon the proposition as to whether the deceased knew of the danger to which he was subjecting himself, and, knowing it, voluntarily exposed himself to it. Unless he was so conscious, and purposely assumed the risk, it is plain that the case does not fall within the exception in the policy relied on in defense of the action. Insurance Co. v. Randolph, 24 C. C. A. 305, 78 Fed. 759; Association v. Hubbell (Ohio) 47 N. E. 544; Insurance Co. v. McConkey, 127 U. S. 666, 8 Sup. Ct. 1360. Judgment reversed, and cause remanded for a new trial.

(87 Fed. 698.)

UNITED STATES v. STANTON.

(Circuit Court of Appeals, Second Circuit. March 10, 1898.)

No. 9.

UNITED STATES ATTORNEYS—COMPENSATION.

Under Rev. St. § 835, a United States attorney is entitled to all the fees and emoluments of his office, when, in addition to the amount of his necessary expenses, they do not exceed $6,000 per annum.

In Error to the Circuit Court of the United States for the District of Connecticut.

This was a petition by Lewis E. Stanton to recover from the United States certain fees claimed to have been earned by him as United States attorney. The court below gave judgment in plaintiff's

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favor for $1,496.82, and the United States have appealed. The opinion filed below, and here reprinted from 75 Fed. 357, was in full as follows:

SHIPMAN, Circuit Judge. In the above-entitled cause, the former judgment having been reversed by the circuit court of appeals for the Second circuit, and a new trial ordered (17 C. C. A. 475, 70 Fed. 890), said cause has been again tried at this, the April term, A. D. 1896, of said court, the petitioner, Lewis E. Stanton, Esq., appearing for himself, and Charles W. Comstock, Esq., United States district attorney, appearing for the United States, and the following are the findings of fact:

(1) The amount of the former judgment rendered by this court in favor of the plaintiff was, exclusive of costs, $1,591.82. The items not in dispute were admitted by the defendant, and were not re-examined. From the sum of $1,591.82 this court disallowed and deducted those disputed items which were definitely rejected by the circuit court of appeals, viz.: Three per diems, $15, in cases of Meech, Webb, and Roath, for attendance before a commissioner prior to the day of actual trial; two per diems in cases of Sparks and Roemer, the attorney having been absent from the state, and having paid some other attorney, for the attendance, $10; also fourteen per diems for appearances before a commissioner in order to discontinue proceedings, pursuant to order of the commissioner of internal revenue, $70,—the total amount deducted as stated in this paragraph being $95.

(2) As to certain other items, the circuit court of appeals required fuller and more explicit findings of fact. These items, which are the only ones now in dispute, are as follows: Telegrams for the United States, $38.37; clerk hire, paid by attorney on account of the United States from January 2, 1885, to April 2, 1888, $699; and printing and stationery between same dates, paid by the attorney, $64.55,—in all, $801.92.

(3) The telegrams, copies of which were preserved, and were produced in court, were the ordinary and necessary telegraphic communications in regard to criminal business, were a part of the necessary expense of the office, were necessarily sent in the course of official business, and the amount charged was paid by the petitioner. The rules on the subject of "Telegrams," contained on page 225 of Cousar's Digest of Rules Relating to Compensation, etc., were not in existence until after 1888.

(4) The clerk hire was paid by the attorney on account of the United States. At that time a special effort was being made by the collector of internal revenue to increase the revenues of the government from the district of Connecticut. The attorney was called upon to perform a large amount of clerical work, and the assistance of clerks was important and necessary, and was obtained. The amount paid by the attorney was about $216 per annum, and is a moderate charge, and was approved by the attorney general.

(5) The amount charged by the attorney for printing and stationery was a part of the necessary expenses of the office. The

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articles therein mentioned were furnished and paid for by the attorney.

(6) All these items were necessary expenses of the office, including necessary clerk hire, and have not been drawn for as personal compensation, and have never been received by the petitioner. Neither has he received them by receiving all or any part of the emoluments of the office. The emolument returns of the attorney for the period during which he held the office have been produced in court. From these returns and other evidence in the case the court now finds that these expenses for telegrams, clerk hire, and stationery have not been received by the attorney in any form. He paid the bills when they were incurred, from private moneys; and none of the bills have either been allowed or paid to him. The account for telegrams was rejected by the attorney general. The one for clerk hire was approved by the attorney general, but rejected by the first comptroller of the treasury. The one for printing and stationery was rejected by the comptroller.

(7) The attorney in this district ordinarily does not receive moneys of the United States. In the few instances when this attorney received such moneys, he promptly paid them over to the treasury, or to the proper officer, in accordance with section 3617, Rev. St. U. S. The attorney did not "retain" the amounts of these bills from any moneys in his hands, for he had no such moneys from which they could be "retained" by him. He was paid such items as were allowed, and no others, directly from the treasury. A full and complete list of those payments appears in the plaintiff's bill of particulars. None of them cover the amount of these expenses.

(8) In regard to the emoluments of the attorney's office during the period when this attorney held it, the court finds that during the whole time, and at each period of rendering accounts, and during each year of his term of office, the earnings of the attorney were less than $6,000 per annum by an amount far greater than the aggregate of these three items. The entire amount paid to him or credited by him during the 3¼ years appears from the bill of particulars to be $4,374.41. The entire amount charged by him in his bill of particulars is $7,359.29, or about $2,265 per annum. The amount of these three items—$801.92—is therefore allowed.

In accordance with the above findings of fact and with the opinion of the circuit court of appeals the court deducts from the former judgment the sum of $95, and now renders judgment in favor of the plaintiff to recover $1,496.82 debt, together with the costs allowed by statute.

Chas. W. Comstock, U. S. Atty.
Lewis E. Stanton, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. We agree with the court below that it is the meaning of section 835 of the Revised Statutes of the United States that the United States attorney is entitled to all of the fees and

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emoluments of his office, when, in addition to the amount of his necessary expenses, they do not exceed the sum of $6,000 per annum. As it now appears that the defendant in error had not received the amount of the items in controversy from the emoluments of his office, the judgment should be affirmed.

(87 Fed. 699.)

SILL v. UNITED STATES.

UNITED STATES v. SILL.

(Circuit Court of Appeals, Second Circuit. April 7, 1898.)

Nos. 77 and 78.

1. DISTRICT ATTORNEY—FEES—CLERK HIRE.
   A district attorney is entitled to recover for clerk hire. U. S. v. Stanton, 87 Fed. 698, followed.
2. SAME—EXTRA SERVICES—COMPENSATION.
   A district attorney is not entitled to extra compensation for services rendered in examining titles to sites for public buildings. U. S. v. Ady, 22 C. C. A. 223, 76 Fed. 359, followed.
3. SAME—ATTENDING COURT.
   Section 824 of the Revised Statutes, which allows compensation to a district attorney for each day of the term where court is held at a place other than his place of abode, is limited by the act of congress of March 3, 1887 (24 Stat. 509, 541, c. 362), to each day when the court is opened by the judge for business, or business is actually transacted in the court.
4. SAME—EXAMINATION OF INTERNAL REVENUE CASES NOT PROSECUTED.
   A district attorney is entitled to compensation for services rendered in investigating violations of the customs laws reported to him by a collector in accordance with section 838 of the Revised Statutes, and in which he determined that no prosecution should be instituted.

In Error to the Circuit Court of the United States for the District of Connecticut.

George G. Sill, per se.
Chas. W. Comstock, U. S. Atty.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. These writs of error involve the right of the United States attorney for the district of Connecticut to recover the following items disallowed in his accounting by the accounting officers of the treasury: (1) Disbursements for clerk hire; (2) opinions and services as to title to post office building sites; (3) per diem fees for attending terms of the circuit and district courts held at places other than his place of abode; (4) fees for examination of internal revenue cases reported to him by the collector, in which he determined that no prosecution should be instituted.

As to the first item, the case is controlled by the decision of this court in U. S. v. Stanton, 31 C. C. A. 197, 87 Fed. 698, where we concurred in the opinion of Judge Shipman in 37 Fed. 252, and adjudged that the disbursements should be allowed.

As to the second item, we approve of the decision of the circuit court of appeals in U. S. v. Ady, 22 C. C. A. 223, 76 Fed. 359,

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where the reasons why there can be no compensation for such services are convincingly stated.

The third item is claimed under section 824 of the Revised Statutes, which allows compensation to a district attorney "for each day of his necessary attendance in the courts of the United States, when the court is held at the place of his abode, five dollars; and for his attendance when the court is held elsewhere, five dollars for each day of the term." The court below allowed the per diems because upon the days in question the courts were open by the order of the court, and the district attorney was constructively in attendance. Neither the judge nor the district attorney was in actual attendance upon these days, and the court was in session only in the sense that the term had not been formally adjourned. The section was considered in U. S. v. Smith, 158 U. S. 346, 15 Sup. Ct. 846, to authorize an allowance per diem to the district attorney when the court is held at a place other than his place of abode, whether he was actually in attendance or not, "since he is presumed to be present at each term for the protection of the interests of the government." In this case, however, the court was speaking of attendance at an ordinary term of court,—a term at which the judge and all the officers are expected to be present,—and did not have occasion to refer to the act of congress of March 3, 1887 (24 Stat. 509, 541, c. 362), which provides as follows:

"Nor shall any part of any money appropriated be used in payment of a per diem compensation to any attorney, clerk or marshal for attendance in court except for days when the court is opened by the judge for business, or business is actually transacted in the court, and when they attend under sections five hundred and eighty three, five hundred and eighty four, six hundred and seventy one, six hundred and seventy two and two thousand and thirteen of the Revised Statutes which fact shall be certified in the approval of their accounts."

When these officers attend under sections 583, 584, 671, and 672, they are present to adjourn court because of the absence of the judge. We think it was the purpose of the act of 1887 to disallow per diem fees for constructive attendance on occasions not covered by the enumerated sections, when there is no judge in attendance for the transaction of judicial business. The interests of the government cannot require the district attorney to be present when no officer is in attendance who can exercise any judicial function, and when the court is only open or in session for the purpose of making clerical entries in the books or records, or of being adjourned from day to day. Within the meaning of the section, the court is not opened by a judge when he is not in attendance, and it is opened merely to be adjourned by a clerk or marshal upon his order; otherwise there would have been no reason for including sections 583, 584, 671, and 672 in the enumerated sections of the act.

The fourth item is for services rendered pursuant to section 838 of the Revised Statutes, similar to those in controversy in U. S. v. Bashaw, 4 U. S. App. 360, 1 C. C. A. 353, and 50 Fed. 749, and subsequently considered in 152 U. S. 436, 14 Sup. Ct. 638. In the Bashaw Case, however, the secretary of the treasury did not fix the sum which he deemed a just and reasonable allowance for the

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services. In this case he did so. The question whether a district attorney is entitled to an allowance for such services, under the terms of the section, has been variously decided by the district courts. It was decided affirmatively by the circuit court of appeals for the Eighth circuit in the Bashaw Case, and was not decided by the supreme court when that case was before it. Unless we are convinced that the opinion of a circuit court of appeals is erroneous, we think, upon principles of comity, this court should follow it. It would seem that a district attorney ought to be compensated for such services, and we do not think the language of the section is necessarily inconsistent with the intention that he shall be. The judgment is reversed, with instructions to the court below to render a judgment in conformity with this opinion.

(87 Fed. 701.)

SPURR v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. June 1, 1898.)

No. 502.

1. NATIONAL BANKS—OFFICERS—CERTIFICATION OF CHECKS WITHOUT FUNDS—PRESUMPTION OF KNOWLEDGE.
   In a prosecution against a national bank president for unlawfully certifying checks, it is not error to instruct the jury that the presumption is that he had knowledge of the condition of the account upon which the checks were drawn, where the same instruction cautions them that such presumption may be rebutted by evidence that the defendant did not in fact have such knowledge.
2. SAME—WILLFUL FAILURE TO INVESTIGATE.
   In order to convict a national bank officer of wrongfully certifying checks, it is not necessary to show that he had actual knowledge that the account against which the checks were drawn was not sufficient; it is enough if he willfully refrained from investigation, in order to avoid knowledge.
3. EVIDENCE — ADMISSIBILITY — SPECULATION BY BANK OFFICER WITH BANK FUNDS.
   Upon the trial of the president of a national bank for certifying checks without funds, evidence of speculations by the cashier with funds of the bank, with defendant's knowledge, is admissible for its bearing upon the right of the latter to rely upon the former's representations as to the state of the customer's accounts.
4. SAME—TO ESTABLISH INTENT—PERIOD OF TIME COVERED.
   The period of time within which collateral transactions offered to show a guilty intent must have occurred is largely discretionary with the court.
5. SAME—REPUTATION FOR HONESTY.
   Upon the trial of a national bank officer for official misconduct, evidence as to the defendant's reputation for honesty and integrity should be limited to such reputation down to the time of the failure of the bank.
6. SAME—REPUTATION FOR TRUTHFULNESS.
   In general, where no attempt has been made to impeach the defendant's testimony, he may not add to the weight of his evidence by evidence of his general reputation for truthfulness.

In Error to the Circuit Court of the United States for the Middle District of Tennessee.

Three indictments were found against the defendant, each of which contained several counts, for violation of section 5208 of the Revised Statutes,

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by which it is provided: "It shall be unlawful for any officer, clerk or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check." By section 13 of the act of congress approved July 12, 1882, it is enacted as follows: "That any officer, clerk or agent or any national banking association who shall willfully violate the provisions of an act entitled 'An act in reference to certifying checks by national banks,' approved March 3, 1869, being section 5208 of the Revised Statutes of the United States, or who shall resort to any device or receive any fictitious obligation, direct or collateral, in order to avoid the provisions thereof, or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor and shall, on conviction thereof in any circuit or district court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court." The three indictments found against the defendant were consolidated and tried together. The several counts of the indictments mutatis mutandis charge that "he, the said Marcus A. Spurr, being then an officer, to wit, the president of said the Commercial National Bank, did willfully violate the provisions of section 5208, United States Revised Statutes, and did, without the consent of the bank, its board of directors and committees, willfully, unlawfully, and knowingly certify a check drawn upon said the Commercial National Bank by said company, to wit, the said Dobbins & Dazey, they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, not having at said time on deposit with the said the Commercial National Bank an amount of money equal to the amount specified in said check," etc. The several counts of the consolidated indictments charged the certification by defendant of four checks drawn by Dobbins & Dazey, between December 9, 1892, and February 13, 1893, both inclusive, on the Commercial National Bank of Nashville, Tennessee, aggregating $95,641.95. The total amount of checks of Dobbins & Dazey certified by defendant between said dates was $110,366.54.

The Commercial National Bank was organized in 1884. Defendant was president, and F. Porterfield was cashier, from its organization to its failure, March 25, 1893. The original capital stock of the bank was $200,000, which was increased from time to time to $500,000. The firm of Dobbins & Dazey was engaged in the purchase, sale, and exportation of cotton. Its financial standing and credit was excellent, but its assets consisted only of money, choses in action, and cotton on hand and in transit. On December 9, 1892, at the close of business, the individual ledger of the bank showed that Dobbins & Dazey's account was overdrawn in the sum of $64,417.97, and on that date the defendant certified that firm's check for $15,000. At the close of business December 17, 1892, Dobbins & Dazey's account was overdrawn in the sum of $51,070.65; and on that day their check for $31,000 was certified by defendant. At the close of business January 2, 1893, Dobbins & Dazey's account was overdrawn $77,515.59, and, at the close of business the next day, $38,125.84, on which day defendant certified their check for $40,000. At the close of business February 11, 1893, Dobbins & Dazey had overdrawn their account $49,454.59 (February 12th was a holiday); and at the close of business February 13, 1893, their account was overdrawn $68,243.73. On that day defendant certified their check for $9,641.95. The evidence on the part of the government tended to show that the account of Dobbins & Dazey was continuously and largely overdrawn upon the individual ledger during the period covered by the checks certified by defendant (except one day in January, 1893, when there was a small credit balance), and that this fact was known to Porterfield, the cashier, and all the employés of the bank under him in authority. The board of directors of the bank consisted of 21 members. It had two standing committees, known as the "Executive Committee" (of which defendant was a member), whose duties were prescribed by by-law 17, and an "Examining Committee," with the powers and duties prescribed by by-law 28. By-law 17 empowered the executive committee to discount and purchase bills, notes, and other evidences of debt, and to buy and sell

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bills of exchange, and required them to report at each regular meeting of the board of directors all bills, notes, and other evidences of debt purchased by them since their last regular report. By-law 28 made it the duty of the examining committee to examine, four times a year or oftener, the affairs of the bank, count its cash, compare the assets with the accounts of the general ledger, and ascertain if these and all other accounts were correctly kept, and whether the bank's condition corresponded therewith, and whether the bank was in a sound and solvent condition, etc., and report the result of their examination at the next regular meeting of the board. Under by-law 8, the cashier was primarily responsible for all funds, property, and valuables of the bank. Under by-law 9, the president was responsible only for such funds, property, and valuables of the bank which should come into his hands as president. Both officers were required under these by-laws, respectively, to give security for the faithful and honest discharge of their respective duties. By-law 19 provided: "That no officer or clerk of this bank shall pay any check drawn upon it or pay out money on any order unless the drawer of such check or order shall, at the time of the presentation thereof, have deposited in the bank sufficient funds to meet such check or order."

There was evidence tending to show that defendant had access to the books of the bank, and that he frequently made inquiries of the clerks and bookkeepers concerning various matters and accounts. The only direct testimony that defendant was informed of the state of that account at the dates of the certifications was that of Porterfield, the cashier, who testified that between November 25, 1892, and the failure of the bank, March 25, 1893, he apprised defendant that Dobbins & Dazey's account was continuously and largely overdrawn. Evidence was also received, as indicating defendant's knowledge of the state of Dobbins & Dazey's account, that defendant and Porterfield, the cashier, were each engaged in speculation in cotton futures, through Dobbins & Dazey, during the period covered by the dates of the checks certified by defendant, and that Porterfield was so engaged without furnishing any margins, and that the funds of the bank were used by Dobbins & Dazey in such speculations without the knowledge of defendant. The evidence upon these points was conflicting. Defendant was also sworn as a witness in his own behalf.

For the purpose of establishing defendant's knowledge and intent, evidence was admitted to show that, in 1886 and 1887, Porterfield, with defendant's knowledge, but without the consent or knowledge of the bank, its directors or committee, used a large amount of the funds and moneys of the bank in the purchase on speculation of stocks for the joint account of himself and defendant and other persons in the name of the bank or in his (Porterfield's) name as cashier. For the same purpose, evidence was also admitted bearing on two other accounts, one opened March 12, 1889, with Herzfeld & Co., New York City, in the name of "Frank Porterfield," separate, and the other opened October 3, 1889, with Latham, Alexander & Co., of New York City, in the name of "Porterfield & Spurr," both of which were continued down to the close of the bank, in 1893, and that the defendant and Porterfield were jointly interested in the speculations indicated by those accounts during the entire period of their existence; that numerous purchases and sales of stocks, bonds, and other funds were made by them for their joint benefit on those accounts; and that large sums of the moneys and funds of the bank were used by Porterfield without securing or reimbursing the bank in such purchases, with the knowledge and consent of defendant after the accounts had been running some time (not when they were opened). There was also evidence that defendant and another director objected to opening an account with Dobbins & Dazey, on the ground that their business was understood to be large, and would require the bank to provide cash to meet the checks of the firm on Eastern drafts, secured by bills of lading, for cotton, and the bank might not always be able to provide sufficient funds to carry the account; that Dudley, the director who shared Spurr's objections to receiving the account, had been in the cotton business, and stated at the directors' meeting that Dobbins & Dazey would be likely to overdraw their account; that, when the account was accepted, the cashier was instructed by the committee, in defendant's presence, not to allow Dobbins & Dazey to overdraw their ac-

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count, nor to borrow more than their line of credit, which was $30,000, and not to discount their drafts without bills of lading attached, and the cashier promised obedience to the order, and reported to Dudley several times that the account was profitable and satisfactory; that the committee understood and believed that the cashier was obeying his instructions; that the members of both committees and the directors had no information, before March 25, 1893, that Dobbins & Dazey's account was overdrawn, or that they were depositing and discounting, or had deposited or discounted, Eastern drafts, without bills of lading attached; that the directors and committee did not regard it as their duty to examine depositor's ledger accounts or the drafts deposited by them; that, prior to and during the period covered by the dates of the checks certified by defendant, Dazey, one of the firm of Dobbins & Dazey, was conducting a system of what is known among bankers as "kiting" between Nashville and New York,—that is, he would draw in the firm name large drafts on John Monroe & Co. and Latham, Alexander & Co., bankers and brokers, the New York correspondents of Dobbins & Dazey, and deposit and discount such drafts without bills of lading attached, and take credit for the proceeds as cash on the account of Dobbins & Dazey in one or the other of the two banks of Nashville in which they carried regular accounts, viz. the Commercial National Bank or the First National Bank. Dazey would then draw in his firm's name checks on one of these banks, generally in favor of the Fourth National Bank of Nashville, but sometimes on another bank. These checks were then certified by the Commercial National Bank or the First National Bank, whereupon the Fourth National or the American National Bank would transmit to New York, by wire, the money to meet Dobbins & Dazey's drafts maturing in New York, and the latter banks would collect the amount of the checks from the Commercial National or the First National Bank, as the case might be. Dazey would then draw another set of drafts in Dobbins & Dazey's name, without bills of lading attached, on the same drawees in New York, and take credit for their proceeds as cash in the Commercial National or First National Bank. He would then draw a second set of checks on the Commercial National Bank or the First National Bank, in favor of the Fourth National Bank or the American National Bank, and these would be certified by the Commercial or the First National Bank. The Fourth National Bank or the American National Bank would transmit the necessary amount by wire to New York to meet the second set of drafts, and would again reimburse themselves by collecting the several sets of checks from the certifying banks. When these drafts were drawn by Dazey, his firm was largely overdrawn with the drawees. This process was repeated again and again for nearly six months preceding the failure of the Commercial National Bank, during which time said bank received and entered as cash Dobbins & Dazey's drafts for $1,829,427.25, which had no bills of lading attached; and at the bank's failure, March 28, 1893, it had on hand Dobbins & Dazey's drafts of this kind to the amount of $142,000, which had been discounted and credited to the drawers by the Commercial National Bank, February 27, 1893.

The jury found the defendant guilty upon certain counts of the consolidated indictments. Motions in arrest of judgment and for a new trial were overruled, and the defendant was sentenced to be imprisoned for two years and six months upon three counts of the consolidated indictments, based on the checks certified by the defendant, January 3, 1893. To reverse this judgment, the defendant brought this writ of error.

John A. Pitts and B. P. Waggener, for plaintiff in error.

Ed. Baxter, for defendant in error.

Before BARR, RICKS, and SWAN, District Judges.

SWAN, District Judge (after stating the facts). The errors assigned and relied upon are 19 in number. Some of these present questions dependent upon the same principles as others, and will not be separately discussed.

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The first assignment is predicated upon the following excerpt from the charge of the court, viz.:

"It was the defendant's duty, before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. From the existence of such a duty you may draw an inference of fact that he did so inform himself, if he did not already know it. But the presumption of knowledge is not an absolute one, and the defendant may show, if he can, that he did not in fact acquire information of the truth."

In the next sentence of the charge, the jury were instructed:

"And, in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins & Dazey justified it, he was not guilty of the offense charged. Mere negligence or carelessness, unaccompanied by bad faith, would not render him guilty."

The learned judge had previously instructed the jury that the checks had become the obligations of the Commercial National Bank solely by defendant's certification. The facts of certification by defendant, as president, and that Dobbins & Dazey had no funds in the bank at the times of the certifications, were admitted. The only question of fact, therefore, left for determination, it is admitted, were the defendant's knowledge of the state of Dobbins & Dazey's account when the checks were certified, and his purpose or intent in the certifications. The instruction criticised did not inform the jury that the effect of the legal presumption was to shift the burden of proof to defendant to negative the inference of fact, but was permissive merely, and left the jury free to determine, upon all the evidence in the case, whether, notwithstanding the inference derivable from the existence of the duty, the defendant had that knowledge of the account which the court, elsewhere in its charge, made a necessary element of the offense. Defendant's legal duty, as an officer of the bank, to be informed, was prima facie evidence of his performance of that duty. Insurance Co. v. Pendleton, 115 U. S. 339, 347, 6 Sup. Ct. 74; Finn v. Brown, 142 U. S. 71, 12 Sup. Ct. 136. This was all the effect given it by the instruction in question. The case of Agnew v. U. S., 165 U. S. 36, 49, 17 Sup. Ct. 235, approved an instruction that an inference or presumption of an unlawful intent throws the burden of proof on defendant.

There was other evidence, direct and circumstantial, tending to show that defendant knew or had reason to believe, at the times of certification of the checks, that the account of Dobbins & Dazey was largely overdrawn. The case therefore was not committed to the jury solely upon the inference predicated upon defendant's official position that he had discharged the duty it devolved upon him before the acts of certification; but the jury were explicitly instructed that the government must establish the defendant's knowledge of the state of the Dobbins & Dazey account beyond a reasonable doubt, in order to maintain any of the counts in the indictment. Nor did the last sentence of the charge covered by this assignment put upon defendant the disproof of knowledge of the account in question. Referring to the inference of knowledge, the court added:

"But the presumption of knowledge is not an absolute one, and the defendant may show, if he can, that he did not, in fact, acquire information of the truth."

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This certainly deprived that presumption of any controlling influence, in the minds of the jury, against the defendant, and emphasized its rebuttable nature. But even if a hypercritical construction, adverse to the defendant, could be extracted from this passage of the charge standing by itself, it is manifest that its connection with other parts of the charge clearly negatives any argument based upon this isolated sentence.

2. The modification of defendant's third, and the refusal of his seventh, request for instructions, were justified by the fact that both were pervaded by the common error that they singled out particular circumstances, omitted all reference to others of importance, and sought to confine the jury to the matters narrated, thus excluding other evidence which the jury might have deemed important. Both were calculated to mislead the jury, and were argumentative. Railway Co. v. Ives, 144 U. S. 433, 12 Sup. Ct. 679; Railway Co. v. Leak, 163 U. S. 280, 16 Sup. Ct. 1020; Agnew v. U. S., 165 U. S. 51, 17 Sup. Ct. 235; Catts v. Phalen, 2 How. 382.

3. The fourth request of defendant was properly refused. It not only prayed for an instruction on the weight of conflicting evidence, but also for a direction to the jury to disregard presumptive proof on the assumption that it was rebutted by other matters of fact. It was no part of the duty of the court to decide upon the relative force of the facts. Crane v. Morris, 6 Pet. 598, 616, 617; Lilienthel's Tobacco Co. v. U. S., 97 U. S. 237, 268; Kelly v. Jackson, 6 Pet. 622.

4. The refusals of the defendant's sixth and ninth requests were also proper. Both were fully covered by the charge given. The court instructed the jury:

"The government is bound, in order to maintain any of the counts in the indictment, to prove * * * (3) that the defendant knew that there were no funds of the drawer in the bank sufficient to meet them [the checks]."

Again: "You must be satisfied from the proof, beyond a reasonable doubt, of every fact essential to the guilt of the defendant, of the specific charges contained in the indictment, before you will be warranted in convicting him. * * * The facts which are charged as constituting guilt must be so proven as to persuade a clear and abiding conviction of defendant's guilt,—such conviction as is not shaken by any reasonable doubt grounded upon the testimony. If you are so convinced of his guilt, he should be convicted; otherwise, not."

The remainder of the sixth request was also fully covered by the following passages in the charge:

"Knowledge of the defendant of the state of Dobbins & Dazey's account, when he certified the checks, is thus made the pivotal question in the case. Upon this question of knowledge, the court charges you that it is not necessary for the government to show that the defendant knew of the lack of funds of Dobbins & Dazey, from an actual examination of the books of the bank or from any inquiries made at that time. If the defendant knew that he had good reason for believing Dobbins & Dazey's account to be overdrawn, and refrained from making such inquiry for the reason that he knew of the condition of the account, or because he was purposed to certify the check without reference to whether there were funds sufficient to meet it or not, that is sufficient; that is to say, if he shut his eyes to what he believed was the fact, and kept himself in ignorance of the state of the account because he believed an examination would disclose the facts, this would be equivalent to express knowledge. Nor is it necessary to prove that the defendant knew just what was the extent of the overdraft on Dobbins & Dazey's ac-

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count, or of the lack of funds to meet the checks. If he knew of the substance of the fact that Dobbins & Dazey had not funds to meet their checks, and that there was no warrant for marking the checks good, that was sufficient."

This correctly states the law. The government was not bound to show defendant "actually knew" that Dobbins & Dazey had no funds in the bank. The judge further said:

"And, in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins & Dazey justified it, he is not guilty of the offense charged. Mere negligence or carelessness, unaccompanied by bad faith, would not render him guilty."

Again: "If the proof fails to satisfy your minds clearly and beyond a reasonable doubt that the defendant did actually know, at the time he certified the checks mentioned in the indictment, that Dobbins & Dazey did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he willfully, designedly, and in bad faith—these words mean substantially the same thing—shut his eyes to the facts and purposely refrained from inquiry and investigation for the purpose of avoiding knowledge."

5. The modification of defendant's second request affords no just cause of complaint. The request recited the respective duties of the president and cashier of the bank as apportioned under by-laws 8 and 9, and the jury were instructed, as prayed:

"These two by-laws taken together mean and imply that the cashier is primarily responsible for all the funds, property, and valuables of the bank, and that the president is responsible only for such funds, property, and valuables of the bank that may be placed in his hands as president, and that both of these officers are each to faithfully and honestly discharge their respective duties."

The court then added:

"But I further charge you that the president is a general officer of the bank, and it is admitted that he had authority, notwithstanding these by-laws, * * * to certify checks; and, when the president assumes to certify these checks as good, the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn."

Without this modification, the instruction prayed would have been misleading, and would have given the jury to understand that by-laws 8 and 9 alone were the measure of defendant's official duty in dealing with the funds of the bank by certification of checks, and that under those the primary responsibility of the cashier for such funds and property would relieve the defendant, as president, from civil and criminal responsibility, under section 5208, Rev. St. U. S., and section 13 of the act of July 12, 1882. These statutes, by necessary implication, impose upon the certifying officer the duty of knowledge of the state of the account before certification of checks drawn upon it. This duty could not be abrogated by by-laws of the bank, or any division of duties between its officers. Nor was it the purpose of these by-laws to exempt the president, when he assumed to certify checks, from the statutory duty of knowledge. This is evident from the bank's by-law No. 19, which provided that:

"No officer or clerk of this bank shall pay any check drawn upon it or pay out money on any order unless the drawer of such check or order shall, at the time of the presentation thereof, have deposited in the bank funds sufficient to meet such check or order."

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By-laws 8 and 9 were, perhaps, properly called to the attention of the jury for their bearing upon the question of the intent with which defendant acted in the certifications. Potter v. U. S., 155 U. S. 447, 15 Sup. Ct. 144. There is no substantial difference between the requirements of these by-laws and the duties imposed by the statute and defendant's official oath required by section 5147, Rev. St. U. S. The defendant certainly could not complain that the adoption from the language of the request of the phrase "faithful and honest discharge of his duties" by the court was an expression of opinion on the facts. If it were, it would not have been an error, as the facts were left to the decision of the jury. Simmons v. U. S., 142 U. S. 148, 12 Sup. Ct. 171; Allis v. U. S., 155 U. S. 123, 15 Sup. Ct. 36.

6. The court instructed the jury:

"The government is bound, in order to maintain any of the counts in this indictment, to prove (1) that the defendant certified the check; (2) that the drawers of the check had not sufficient funds in the bank to meet such check; (3) that the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offense charged will be explained, and its modification stated further on."

It is argued that the jury were thus informed that the establishment of these three facts—the first two of which were conceded—would authorize conviction. This would be true if the instruction had been submitted as complete in itself upon the essentials of the crime, and as dispensing with the necessity of proof of the intent which accompanied the act of certification; but the last paragraph clearly excluded that view of its design and scope. Its promise was fulfilled in the passages in the charge quoted in our review of the sixth request. These, in connection with the extract criticised, defined fairly the essentials of the offense and the degree of proof required upon the questions of knowledge and intent. The court was not bound to adopt the language of the request. Railroad Co. v. Horst, 93 U. S. 295; Tucker v. U. S., 151 U. S. 164, 170, 14 Sup. Ct. 299.

Assignments 7 and 9: The seventh and ninth assignments are based upon defendant's fifth, and part of defendant's seventh, request for instruction. The former was, in substance, that if the jury found that the account of Dobbins & Dazey, upon the books of the bank, was overdrawn continuously during the period covered by the checks certified, and that the defendant certified the checks in ignorance of such overdraft, "believing at the time that the exchange deposited by Dobbins & Dazey, on the days on which such checks were certified, was sufficient to cover the amount of such checks [besides the overdraft then existing], then he is not guilty, and you should acquit him unless such ignorance was willful, as elsewhere explained in the court's instructions." The modification criticised consisted in adding the words inclosed in brackets. The subject had been fully treated in the charge, and the request should have been refused. Without the modification, it is clear that the instruction prayed would, if granted, have given the jury to understand that it was not necessary for defendant to have ascertained the state of the Dobbins & Dazey account before certifying the check, but it would be sufficient per se to acquit him if he believed that the amount of the

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exchange deposited—inclusive, necessarily, of the "kiting" and other drafts made by that firm upon overdrawn accounts without bills of lading attached—equaled the checks certified. This would have been in direct conflict with that part of the charge presented by the first assignment, which we have approved, and would have nullified the statute which prohibits certification of checks "before the amount thereof shall have been regularly entered to the credit of the drawer upon the books of the banking association." The purpose of the modification was to preclude such a misconception of the defendant's duty, and to bring the request into harmony with the statute and the general charge definitive of that duty. The only lawful basis for certification is that prescribed by the statute, and the utmost effect that can be ascribed to the instruction as amended was that it required the defendant to act upon the state of the account, not merely upon his belief in the amount of the exchange deposited, leaving the jury free, however, under the general charge, to determine the intent with which the defendant acted. The pith of the instruction, as thus modified, was so fully covered by the extracts from the charge given in the examination of the first, fourth, and tenth assignments of error as to leave the defendant no ground of complaint against the amendment.

The court adopted part of defendant's seventh request, after modifying it so that it read:

"If you find that in each instance, when he certified a check, the defendant had information from the cashier or exchange clerk upon which he relied in good faith, that a sufficient amount had been deposited that day, and was in the bank to cover the checks certified [I add, in addition to the existing overdraft], he would not be guilty under the indictment, and you should acquit him."

The qualification of this request complained of is contained in the words in brackets. The reasons stated in the consideration of the seventh assignment of error approve the action of the court in making the same addition to this part of the charge.

Assignment 11: The eleventh assignment of error has nothing to sustain it. The jury returned into court after receiving the charge, and asked the following question: "We want the law as to the certification of checks when no money appeared to the credit of the drawer." The court, in response, read the first paragraph of section 5208 of the United States Revised Statutes, and asked the jury if that answered their question. The foreman responded, "Yes." The court then read said paragraph a second time, remarking, "I read it again, that you may all understand it." This action was excepted to, on the ground that the court failed to read and explain section 13 of the act of July 12, 1882, imposing the penalty for the willful false certification of checks. The argument in support of this exception assumes that "what the jury wanted to know was the law applicable to this case, * * * the law applicable to the criminal false certification,"—and therefore the court should have read section 13 of the act of July 12, 1882. It is also urged that the court gave the jury to understand that the certification of a check, when there were no funds in bank to meet it, was sufficient to sustain the indictment. The assumption is negatived by the

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answer of the jury. The court charged that, to warrant conviction, the certification must have been willfully made, not merely false in fact. That distinction was emphasized in the following extract from the charge:

"The question remains for you to settle upon all the evidence whether the defendant, Spurr, in certifying these checks, acted in good faith, and without any intent to do that which the law forbids, and which he must be presumed to know was unlawful, namely, the certifying of a check as good when the maker of it had no funds in the bank to meet it. If he acted in good faith, believing that the makers of the checks had funds in the bank to pay them, he should be acquitted. If he certified the checks either knowing that the funds to respond were not in the bank, and that the making of the check was unwarranted, or, having in his conscience good reason for believing that such was the fact, purposely refrained from inquiry, then the charge against him is made out. The facts which are charged as constituting his guilt must be proven beyond a reasonable doubt."

This was a full and fair exposition of the disputed elements of the offense charged. Other parts of the charge were equally explicit to the same effect, as we have shown elsewhere.

Assignment 12: Error is assigned on the admission of evidence of the stock transactions had through the bank or Porterfield, as cashier, in 1886 and 1887. This was received "for its bearing upon the right of Spurr to rely upon Porterfield's representations upon the question of fact,—whether he did rely upon any assumed correctness or honesty of action." Upon this question the government offered evidence of purchases and sales of stock on the New York Exchange, through certain brokers and dealers in stocks in New York in the name of Porterfield, cashier of the Commercial National Bank, for the account of sundry customers of said bank, as well as Porterfield, R. S. Cowen, assistant cashier of said bank, and defendant. These purchases and sales were made with funds of the bank remitted to New York by Porterfield, and embraced transactions from February 18, 1886, to January 15, 1887, both inclusive. The amount of the bank's money remitted by Porterfield to be used as margins in these transactions was over $66,000. The profits accruing to defendant from these ventures were credited to him on the books of the Commercial National Bank at the times of the sales, and afterwards were credited on his pass book, and drawn out by him. There was also evidence that defendant accounted for the exact amount of losses shown upon the accounts, statements, tickets, slips, and memoranda made out by Porterfield in reference to said transactions, and gave his notes to the bank with collateral security for his share of the losses; but defendant never informed the executive committee of the bank or its directors that these notes were given to cover losses on stock speculations. There was evidence that the funds of the bank were thus used by the cashier with defendant's knowledge, but without that of the directors or committees of the bank. The evidence relied upon to show defendant's intent in certification of Dobbins & Dazey's checks was largely circumstantial. In such cases, a broad range of inquiry is permitted, and when the evidence tends even remotely to establish the ultimate fact, its admission will not be ground for reversal. Clune v. U. S., 159 U. S. 593, 16 Sup. Ct. 125; Alexander v. U. S., 138 U. S. 353, 11 Sup. Ct. 350. Evi-

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dence of similar transactions to illustrate the character of the act in question has repeatedly been held competent in both criminal and civil cases, and is often the only method of establishing the intent with which they were done. Allis v. U. S., 155 U. S. 119, 15 Sup. Ct. 36; Wood v. U. S., 16 Pet. 342; U. S. v. Wood, 14 Pet. 230; Taylor v. U. S., 3 How. 197–208; Mining Co. v. Watrous, 9 C. C. A. 415, 61 Fed. 163–179.

The objection that the collateral transactions were too remote is not tenable. It goes only to the weight of the testimony. The period of time within which the matter offered to establish the guilty purpose must have occurred to permit of their admission is largely discretionary with the court. Moore v. U. S., 150 U. S. 60, 14 Sup. Ct. 26. In U. S. v. Thirty-Six Barrels of High Wines, 12 Int. Rev. Rec. 40, 41, Judge Woodruff said that, for the purpose of showing the quo animo of an act under inquiry, he would not hesitate to admit evidence of acts running back to the enactment of the internal revenue law, which had then been passed fully five years. Similar evidence was received in Coffin v. U. S., 162 U. S. 664, 16 Sup. Ct. 943, for the same purpose. It is every-day practice to admit proof of this character to show intent on the trial of persons charged with counterfeiting. The evidence was properly received, and its purpose carefully defined and limited, in the charge of the court, in accordance with the case last cited.

Assignments 13 and 14: The instruction which is the subject of this assignment and the refusal of defendant's thirteenth request may be considered together. The first declared and the second conceded the illegality of speculation by a national bank or its officers in stocks and bonds upon margins. This was correct. First Nat. Bank v. National Exchange Bank, 92 U. S. 128; Bank v. Kennedy, 167 U. S. 362, 367, 17 Sup. Ct. 831. The court then told the jury that if Porterfield, with Spurr's knowledge, was engaged in misusing the bank's funds and credits on cotton and stock exchanges in his own or the interest of others, "the jury were at liberty to find in that a reason why Mr. Spurr should not have confidence in Porterfield's integrity and fidelity to the interests of the bank, and why Mr. Spurr would, in the exercise of his own duties, have exercised a closer scrutiny of the dealings of Dobbins & Dazey with the bank, especially if he had reason to suppose that firm was engaged in such speculations." We perceive nothing erroneous in this. Preston v. Prather, 137 U. S. 605, 11 Sup. Ct. 162. The request refused would, if granted, have practically directed the jury that the confessedly illegal practices of the national banks of the city in receiving and executing orders for the purchase and sale of stocks and bonds on margins, if profitable, the receipt by stockholders of profits therefrom, and the opinions of individuals engaged in like speculations, provided defendant had no reason to suspect the cashier of dishonesty in the conduct of such transactions, and secured the bank against loss from the execution of his orders for such prohibited purchases and sales, could not and ought not to be given any weight against defendant, although the Commercial National Bank did such business. This proposition is entirely untenable, and is irreconcilable with the ad-

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mission in evidence of those transactions which we have just approved. The evidence of the manner in which the defendant dealt or permitted others to deal with the funds of the bank having been properly admitted, its weight and effect was a question for the jury, and not one of law for the court.

Assignment 15: The modification of defendant's tenth request was necessary to prevent the misleading of the jury. The court, at defendant's request, had told the jury, in substance, that, if defendant certified the checks in good faith and honest reliance on the cashier's statement as to the Dobbins & Dazey account, his certifications would not be criminal. This followed immediately the clause modified, which read as presented: "And if the cashier was reputed to be, and believed by the defendant to be, a man of honesty and truth, the defendant would have a right to rely upon his statements in regard to that account [Dobbins & Dazey's]." The court struck out the word "truth," and substituted therefor the words "right conduct as respects the affairs of the bank," and with this amendment granted the request. Whether or not defendant had a right to rely or in fact relied in good faith upon Porterfield's statements in reference to that account was a question of fact to be determined, not alone by the cashier's reputation or by defendant's professed belief in his general truthfulness, but from all facts and circumstances known to defendant tending to approve or discredit the bona fides of his confidence in Porterfield's official conduct. Defendant was not prejudiced by this amendment, especially as the general charge covered the subject fully.

Assignment 16: The eleventh request, to the effect that unless defendant knew or had reason to believe that the cashier "was despoiling the bank, and using its funds instead of his own," in his dealings in stocks and bonds and cotton futures, the fact that defendant knew that the cashier had dealt in those commodities "would not deprive the defendant of the right to rely on his statements in respect to the affairs of the bank," was substantially granted, after substituting for the phrase "so despoiling the bank and using its funds" the words "had been using the funds or credits of the bank." There is no merit in the objection made to this change. It is mere verbal criticism. The substitution of the words "unlawfully in respect to its affairs," in place of the word "dishonestly," in the last paragraph of the request,—making it read, "In order to deprive the defendant of the right to rely upon the cashier, it must be shown beyond a reasonable doubt that he knew the cashier was unfaithful to the bank, and acted unlawfully in respect to its affairs,"—fully preserved the rights of defendant, and was an impartial reference to all the evidence of defendant's knowledge of the cashier's transactions. The amendment was a synonym, in substance, of the adverb it displaced. The cashier could not have acted "dishonestly" without acting "unlawfully" in respect to the bank's affairs. This request was also so fully covered by defendant's twelfth request, which was granted, that it might correctly have been refused in toto.

Assignment 17: There is nothing in this assignment by which the accounts whose admission is alleged is error can be identified. They

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are mentioned as "said accounts," without further description. If we assume the reference to be made to the accounts of Herzfeld & Co. with "Frank Porterfield, Separate," and that of Latham, Alexander & Co. with Porterfield and Spurr,—and this is the theory of counsel for plaintiff in error,—they were plainly competent, under the same rule of evidence which sanctions the admissibility of the transactions had with Kohn, Pepper & Co., De Neufville & Co., and Latham, Alexander & Co., discussed in the examination of defendant's twelfth assignment.

Assignment 18: Defendant's fourteenth request was rightly denied, because fully covered by the instruction given in response to defendant's twelfth request.

Assignment 19: The questions arising under this assignment are presented as if it involved the right of a defendant in a criminal case to give in evidence his character for truth and veracity. It complains of "the exclusion of the evidence of John Overton and other witnesses offered by defendant—First, as to defendant's good character for truth and veracity; and, secondly, as to defendant's good character for honesty and integrity during the whole period of his residence in Nashville." After defendant had testified, his counsel claimed that his testimony had been impeached by the cross-examination, and offered testimony to his good character for truth and veracity and honesty and integrity during the entire period of his residence in Nashville, down to the time of the trial. The court limited the inquiry into defendant's general character to the time of the failure of the bank, reserving for further consideration his right to adduce evidence of his character for truth and veracity. To this ruling the defendant duly excepted. The government "admitted defendant's good character for honesty and integrity down to the period of the charge"; whereupon the court restricted defendant to 10 witnesses upon that point, and that number was examined under the above limitation as to time. The correctness of that limitation is the first inquiry. The reasons assigned by the learned judge for restricting the evidence of defendant's reputation for honesty and integrity to the time of the bank's failure meet our approval. He said:

"If we were to bring the time down to the present, it would be liable to embarrass the jury, and turn their minds from the real merits of the case, and put before them opinions which ought to be kept as far from the jury as possible. * * * We would proceed to launch ourselves upon an inquiry as to what the people of the community thought of the case at present. * * *"

The authorities support this ruling. State v. Marks (Utah) 51 Pac. 1090; State v. Kinley, 43 Iowa, 296; Wroe v. State, 20 Ohio St. 460, 472; White v. State, 111 Ala. 92, 21 South. 330.

The question raised by the second branch of this assignment was rightly decided. The ground on which the offer of evidence as to defendant's character for truth and veracity was based and is here urged was "that defendant had been attacked as a witness, and his testimony impeached by the substance and manner of his cross-examination by counsel for the plaintiff, which had shown a purpose to argue to the jury that he had not testified honestly and conscientiously, but had testified falsely." No testimony was introduced

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by the government attacking defendant's character for truth and veracity, nor was any evidence offered in rebuttal by the government. A careful reading of defendant's cross-examination fails to disclose any ground for the admission of evidence of his general reputation for truth and veracity. The fact that contradictions exist between his testimony and that of other witnesses affords no ground for its admission. 1 Greenl. Ev. § 469. In his character as a witness, defendant is not entitled to any privilege not extended to other witnesses. Reagan v. U. S., 157 U. S. 301, 305, 15 Sup. Ct. 610; U. S. v. Hollis, 43 Fed. 248. In general, where no attempt has been made to impeach him by evidence of bad character, or of contradictory statements, or by the cross-examination, he cannot corroborate his testimony or give it weight by evidence of his general reputation for truthfulness; nor will his own view of the effect of his cross-examination make such testimony competent. The rule as to the admissibility of evidence of character is thus broadly stated by Greenleaf (1 Greenl. Ev. § 54):

"And, in all cases where evidence is admitted touching the general character of the party, it ought manifestly to bear reference to the nature of the charge against him."

The evidence offered was obviously intended to give weight to the defendant's personal testimony, not for the purpose of establishing a general character inconsistent with the offense charged. The weight of reasoning and authority justified its exclusion. Stevenson v. Gunning, 64 Vt. 609, 25 Atl. 697; Funderberg v. State, 100 Ala. 36, 37, 14 South. 877; Tedens v. Schumers, 112 Ill. 266, 267; People v. Cowgill, 93 Cal. 597, 29 Pac. 228.

A careful examination of the record satisfies us that the defendant has had a fair trial, and that, both in the rulings upon evidence and in the submission of the case to the jury, his rights were carefully protected. The judgment of the circuit court for the Middle district of Tennessee is therefore affirmed.

(87 Fed. 742.)

TRUMAN v. HOLMES et al.

(Circuit Court of Appeals, Ninth Circuit. February 21, 1898.)

No. 376.

PATENTS—EFFECT OF WITHDRAWAL OF ORIGINAL SPECIFICATIONS.

In Putnam's patent, No. 232,207, for breaking-carts, the effect of the withdrawal of the original specifications after the application was rejected is to limit his patent to the specific invention described in his amended specifications, to wit, the construction of carts where the central portion of the straps extends "beneath the axle." 80 Fed. 109, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of California.

John L. Boone, for appellant.

M. A. Dorn, D. S. Dorn, and Chas. E. Nouges, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

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HAWLEY, District Judge. This is a suit in equity for the infringement of letters patent No. 232,207, granted to De Witt C. Putnam on September 14, 1880, for breaking-carts. Appellant claims that the right, title, and interest in said invention and letters patent have been assigned to him in the territory named, and that by virtue thereof he is entitled to sue for and recover all damages and claims for past infringements. He prays for an injunction, and for such other and further relief as in equity he may be entitled to. It appears from the record that on July 16, 1886, Putnam sold and assigned to Truman, Isham, and Hooker all his right, title, and interest in and to the patent for the territory "known and described as 'San Francisco County, State of California,' and no other place or places"; that on February 28, 1893, Truman, Isham, and Hooker assigned said patent to Truman, Hooker & Co., including "all past damages for infringements, royalties, or profits"; that on March 30, 1893, Truman, Hooker & Co., as plaintiffs, commenced an action at law in the circuit court of the United States for the Northern district of California against Henry E. Holmes and M. P. Holmes, doing business under the firm name of H. E. Holmes & Co. (appellees herein), to recover the sum of $20,000, as damages for alleged infringements of the patent; that the trial of that suit resulted in a verdict in favor of the plaintiffs therein in the sum of $150 and costs; that a writ of error was thereafter duly taken from said judgment to the circuit court of appeals, and was there affirmed (Holmes v. Truman, 14 C. C. A. 517, 67 Fed. 542); that on May 28, 1895, Truman, Hooker & Co. assigned said patent to I. J. Truman (appellant herein), together with "all claims and demands against past infringements." This suit was commenced on March 10, 1896. The circuit court (Judge McKenna presiding) dismissed the bill upon the ground that the construction of the patent confines it to a cart with straps beneath the axle, and that the respondents' carts, not being of that construction, do not infringe. But he afterwards set the decree aside "because, in addition to the points decided, there are other points in the brief, which, by inadvertence, did not receive the deliberate consideration and judgment of the court." The order of submission was therefore vacated, and the case came up regularly before Judge Morrow, and a decree was entered dismissing the bill. This appeal is from the last decree.

It is argued by appellees that the order of the circuit court dismissing the bill should be sustained upon various grounds, and a dozen or more reasons are given, each of which is claimed to be a complete defense to this suit. It is insisted, among other things, that the only object of bringing this suit is for the purpose of obtaining an accounting for the past infringements which were involved in the case at law, previously heard, determined, and settled. If this be true, it necessarily follows that this suit was properly dismissed. Section 723 of the Revised Statutes of the United States provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." A court of equity takes cognizance of a suit for the infringement of a patent when the complainant is entitled to relief by injunction; but, in order to sustain a suit of this character,

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it must affirmatively appear that some ground of equitable jurisdiction exists, or that the complainant has no plain, speedy, or adequate remedy at law. Equity will not entertain a suit which simply involves the ascertainment of damages and profits for past infringements. Root v. Railway Co., 105 U. S. 189, 215; Hayward v. Andrews, 106 U. S. 672, 1 Sup. Ct. 544; Clark v. Wooster, 119 U. S. 325, 7 Sup. Ct. 217; 3 Rob. Pat. § 1086; Walk. Pat. § 572. Appellant, however, contends that the evidence shows that appellees had been engaged in the manufacture of carts of the same general construction since the judgment was rendered in the action at law, as before, and that, this court in that case having held that they were guilty of infringing appellant's patent, the decree dismissing the bill in this case is erroneous. In Holmes v. Truman, 14 C. C. A. 517, 67 Fed. 542, the direct question here involved was not presented. In that case the defendants admitted that they constructed a cart differing from that of the plaintiffs only in the fact that the forward ends of the straps, instead of being attached directly to the shafts, are attached to a crosspiece which connects the two shafts in front of the seat, and that, instead of being continuous straps, they were formed of two pieces fastened together by nut and screw at the angle underneath and behind the axle. It was upon these facts that the contention was there made that the plaintiffs must be held to the specific construction described in their letters patent, and it was in reply to this contention that the court said:

"We do not so construe the patent. The crossbar between the shafts is substantially a part of the shafts. It makes no difference, so far as the function of the straps is concerned, whether they are attached to the shafts, or attached to a crossbar which connects the shafts; and it makes no difference whether the straps are one continuous piece, or composed of two. It is true that the plaintiffs' patent does not cover any arrangement by which the seat and the footboard may be made to move in unison. Those results were obtained in the butcher's cart. But it is a fair interpretation of the plaintiffs' patent to say that they are protected in the use of a cart in which the shafts are placed directly upon the springs, and the footboard is sustained beneath the axle by straps; and it is unimportant whether the straps are attached to any particular place along the shafts, or to a crossbar between the shafts, or whether they are made of one piece, or of two or three pieces."

The only testimony cited by the appellant in support of his contention that the facts in this case are substantially the same is that of M. P. Holmes, in reply to certain questions propounded to him by appellants' counsel, as follows:

"Q. Have you since 1894 manufactured any carts having straps that supported the footboard? A. Yes, sir; a strap that supports the footboard. It must have something to support it. Q. What was the front end of such straps attached to? A. To a crossbar that is connected with the shaft. Q. What was the rear end of the strap attached to? A. Some of them came back here to the rear. The footboard came up in front of the axle, and they were attached to the seat. Those carts that had a rack behind were made in that way. They did not extend back of the seat or axle at all. Others we have made for the purpose of putting a footboard on them. We have put two rods from the shaft down through a short piece of iron that holds that footboard on that rack. We made them in that way."

When this witness answered, with reference to the straps, that "some of them came back here to the rear," it is evident that he was

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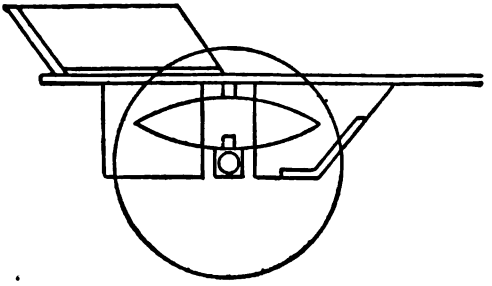
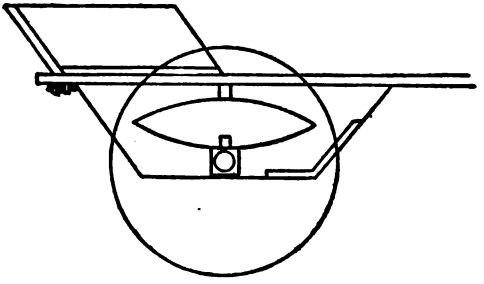
illustrating his evidence by pointing out, upon a model, drawing, or exhibit, some point in front of the axle, because in the same answer he says, "They did not extend back of the seat or axle at all." This is made clear by a reference to his entire testimony relating to the kind of carts manufactured by him after the decision of this court in the action at law, and is plainly shown by his answer to a question asked him upon cross-examination, as follows:

"Q. Have you ever manufactured, sold, or used any carts in which the braces or straps have their ends secured to shafts before and behind the axle, while the central portion extended beneath the axle, and parallel with the shaft, and is adapted to support the transverse footboard? A. No, sir."

In Truman v. Implement Co., 87 Fed. 1006, which is in all essential particulars similar to this, and is treated in the briefs of counsel as a "companion case," because it involves substantially the same principles, appellant's counsel has made drawings which clearly illustrate the difference in the construction of the carts, after the former suit, from the carts which were held to be an infringement of the appellant's patent in the former suit. These drawings are as follows:



Cart Made and Sold by Respondent.



Cart Adjudged by This Court, in Truman et al. v. Holmes et al., to be an Infringement.

The case, upon its merits, depends upon the question whether a cart constructed without the straps passing beneath the axle constitutes an infringement of the patent. This must be answered by a construction of the language used in the claim of the patent. The original claim of Putnam, as first presented to the patent office, reads as follows:

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"The improvement in breaking-carts, consisting in suspending the footboard, E, by means of straps or hangers, F, from the shafts, seat, or that portion of the vehicle connected with the springs alone, whereby the seat and footboard having a common vertical movement, substantially as and for the purpose herein described."

This claim was rejected upon the ground that "the patent of Jesse Winecoff, Oct. 17, 1871, No. 119,956 (sulkies), substantially answers the claim." The applicant thereupon amended "by erasing the entire specification, and substituting" a new one. Figs. 1 and 2, referred to in the amended specification, are as follows:

Fig. 1.

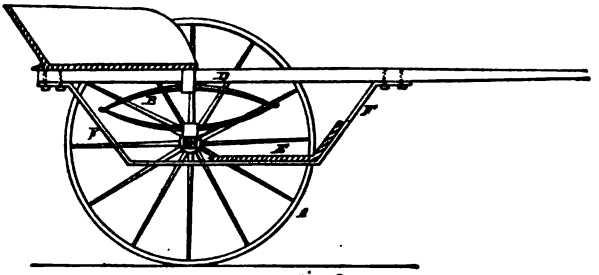
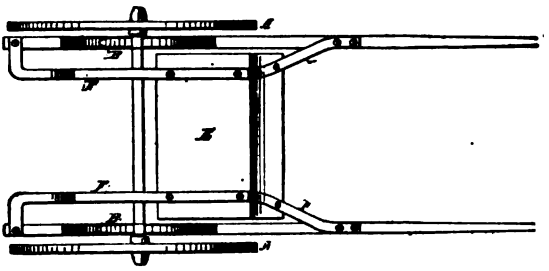


Fig. 2.



The amended specifications and claim read as follows:

"My invention relates to certain improvements in that class of vehicles known as 'breaking-carts,' in which young colts are broken to harness. Carts of this description are usually provided with very long shafts, and the seat is placed on springs immediately over the axle, or at such a distance back that the driver is not in danger of being kicked by a fractious animal. In this class of vehicles the footboard is usually secured to the axle, while the seat is on springs; and it is therefore uncomfortable to ride upon, since, while the body of the occupant may move up and down, his feet must remain stationary. My improvements consist in so attaching the footboard to the vehicle that it shall move in unison with the seat; the same spring which supports the seat serving as a spring for the footboard, as is more fully described in the accompanying drawings, in which Fig. 1 is a longitudinal section of my device; Fig. 2 is a bottom view. Breaking-carts usually have two wheels, A, only, and the springs, B, are secured both to the axle, C, and the shafts, D; said shafts being secured on the springs in the manner shown. In order to attach the footboard, E, to the vehicle, I place metallic straps or bands, F, in a proper position to hold the footboard; connecting these straps with the shafts and seat, and not with the axle. I have shown the straps connected with the shafts at the rear ends of, and forward of, the whiffletree bar. It will be seen, by this construction, that the rear ends of

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the shafts and the seat are supported upon the springs, B, while the straps, F, pass beneath the axle, and are bent up so that their rear and their front ends are secured to the shafts at points behind and in front of the axle, while the central portion does not touch it at all. The footboard, E, with its turned-up front portion, is then secured upon the bottom and front portions of the straps, F. Being thus entirely independent of any direct connection with the axle, it will have the same movement imparted to it by the action of the spring that the shafts have, and it will have none of the unpleasant jar that a stationary footboard, or one supported from the axle, will have, while the arrangement of the straps parallel with the shafts facilitates the attachment of the transverse footboard, and makes a strong construction. Having thus described my invention, what I claim as new, and desire to secure by letters patent, is the braces or straps, F, having their ends secured to the shafts before and behind the axle, while the central portion extends beneath the axle, and parallel with the shafts, and is adapted to support the transverse footboard, E, substantially as and for the purpose herein described."

We are of opinion that the effect of the withdrawal of his original specifications and claim was to limit his patent to the specific invention as described in the claim of his amended specifications, to wit, to the construction of carts where the central portion of the straps "extends beneath the axle." The contention of the appellant that he should not be restricted, in the construction of the carts, to braces or straps which extend beneath the axle, as described in his amended claim, is fully met and answered by the decisions of the supreme court of the United States. In Roemer v. Peddie, 132 U. S. 313, 317, 10 Sup. Ct. 98, the court said:

"This court has often held that when a patentee, on the rejection of his application, inserts in his specification, in consequence, limitations and restrictions for the purpose of obtaining his patent, he cannot, after he has obtained it, claim that it shall be construed as it would have been construed if such limitations and restrictions were not contained in it. Leggett v. Avery, 101 U. S. 256; Vulcanite Co. v. Davis, 102 U. S. 222, 228; Fay v. Cordesman, 109 U. S. 408, 3 Sup. Ct. 236; Mahn v. Harwood, 112 U. S. 354, 359, 5 Sup. Ct. 174, and 6 Sup. Ct. 451; Union Metallic Cartridge Co. v. United States Cartridge Co., 112 U. S. 624, 644, 5 Sup. Ct. 475; Sargent v. Lock Co., 114 U. S. 63, 5 Sup. Ct. 1021; Shepard v. Carrigan, 116 U. S. 593, 597, 6 Sup. Ct. 493; White v. Dunbar, 119 U. S. 47, 7 Sup. Ct. 72; Sutter v. Robinson, 119 U. S. 530, 7 Sup. Ct. 376; Bragg v. Fitch, 121 U. S. 478, 7 Sup. Ct. 978; Snow v. Railway Co., 121 U. S. 617, 7 Sup. Ct. 1343; Crawford v. Heysinger, 123 U. S. 589, 606, 607, 8 Sup. Ct. 399."

In Morgan Envelope Co. v. Albany Perforated Wrapping-Paper Co., 152 U. S. 425, 429, 14 Sup. Ct. 629, the court said:

"It is insisted in this connection, however, that, under the words 'substantially as described,' the patentee is entitled to claim a band of oval or oblong shape, and that, looking at his specification and drawing in connection with the claim, it is obvious that the latter should be so limited. But the patentee having once presented his claim in that form, and the patent office having rejected it, and he having acquiesced in such rejection, he is, under the repeated decisions of this court, now estopped to claim the benefit of his rejected claim, or such a construction of his present claim as would be equivalent thereto. Leggett v. Avery, 101 U. S. 256; Shepard v. Carrigan, 116 U. S. 593, 6 Sup. Ct. 493; Crawford v. Heysinger, 123 U. S. 589, 606, 8 Sup. Ct. 399; Union Metallic Cartridge Co. v. United States Cartridge Co., 112 U. S. 624, 5 Sup. Ct. 475."

The views herein expressed are conclusive of this case, and render it unnecessary to examine any of the other questions elaborately argued by counsel. The judgment of the circuit court is affirmed, with costs.

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(87 Fed. 750.)

In re CHICAGO SUGAR-REFINING CO.

(Circuit Court of Appeals, Seventh Circuit. June 3, 1898.)

No. 521, Original.

APPEALS IN PATENT CASES—REVERSAL—PRELIMINARY INJUNCTION.

When an appellate court declares a patent valid and infringed, reverses the decree below, and remands the cause for further proceedings not inconsistent with its opinion, it does not follow as a matter of course that an injunction pendente shall issue; but, in the absence of any directions in regard thereto in the opinion or mandate, the matter rests in the discretion of the trial judge.

C. K. Offield, for petitioner.

Before WOODS and SHOWALTER, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge. This is a petition for a writ of mandamus to compel the modification of a decree entered on the 10th of May, 1898, in the case of the Chicago Sugar-Refining Co. v. Charles Pope Glucose Co., pending in the circuit court of the United States for the Northern district of Illinois, on the ground that as entered the decree is inconsistent with the mandate of this court sent down upon reversing the decree of the circuit court on the appeal reported in Chicago Sugar-Refining Co. v. Charles Pope Glucose Co., 28 C. C. A. 594, 84 Fed. 977. The questions involved in the appeal were of the validity and infringement of letters patent for inventions. The circuit court, having found the patents invalid, dismissed the bill. This court, having reached the conclusion that one of the patents was valid and had been infringed, ordered that the decree below be "reversed, and the cause remanded for further proceedings not inconsistent with this opinion." The petition now presented, without setting out the terms of the mandate or alleging the substance thereof, shows that the opinion of this court was filed on the 5th day of February, 1898; that the mandate was issued on the ensuing May 5th, and filed on the same day in the circuit court, and that at the same time the complainant's counsel presented to the court a form of decree, a copy of which is set out, conforming, it is alleged, to the opinion and mandate of this court, ordering, among other things, that the defendants, their agents, officers, and servants, "do absolutely desist and refrain from directly or indirectly employing the processes or practicing the inventions of said letters patent," and that a writ of injunction issue accordingly, and referring the case to a master to take an accounting of gains and profits; that to the decree so presented the court, the Honorable Peter S. Grosscup, who had rendered the original decree, presiding, added the following clause: "The injunctional part of this decree is stayed for thirty days upon the defendant's giving bond by May 12, 1898, in the sum of twenty thousand dollars, to be approved by the clerk of this court, to respond for all damages and profits suffered by reason of such infringement;" and that the bond required was given and the injunction stayed. The petitioner further alleges the belief that it was

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"without the power, volition, or jurisdiction of the circuit judge, under the opinion and mandate as filed in this case, to change, add to, or amend the decree," as was done; that the amendment should be stricken out; "that all the foregoing matters, conditions, and things set forth in the petition are fully shown, identified, and described in a certified copy of the case and proceedings filed herein," to which reference is made. The prayer is for "a writ of mandamus commanding the judges, and each of them, of the circuit court of the United States for the Northern district of Illinois, to set aside and strike from the decree the amendment and addition thereto as herein complained of, entered upon the 10th day of May, 1898." No copy of the record of the case in the circuit court in fact accompanies the petition, and the alleged reference is supposed to be to a transcript of that record filed with the clerk of this court before this petition was filed, showing an appeal of the petitioner from the decree of May 10th, which it is now sought to correct by the writ of mandamus. That appeal is still pending, and the objection is made by counsel for the appellees that, pending that appeal, which, it is urged, has removed the record of the case from the circuit court to this court, a petition for the writ of mandamus cannot be entertained, and that, if the petitioner is entitled to relief, it must be obtained by means of the appeal.

Disregarding this and other technical objections to the petition, we are of opinion that the rule to show cause should not issue. There is nothing in the opinion or mandate of this court which in terms required the court below to grant an injunction, and we cannot agree with the proposition of counsel that once this court had declared the validity and infringement of the letters patent, and remanded the case for further proceedings not inconsistent with its opinion, the right to an injunction followed as a matter of course, and that the circuit court was without discretion in the premises. No ruling to that effect has been cited, and, instead of there being no authority to the contrary, as asserted by counsel for the petitioner, there are many cases at circuit in which such discretion has been exercised. See the following collected upon a few minutes' search: Brake Co. v. Carpenter, 32 Fed. 545; Mill Co. v. Coombs, 39 Fed. 803; Whitcomb v. Coal Co., 47 Fed. 315; Campbell Printing-Press & Mfg. Co. v. Manhattan Ry. Co., Id. 663, 49 Fed. 930; Carter & Co. v. Wollschlaeger, 53 Fed. 573; Brush Electric Co. v. Accumulator Co., Id. 804; Ney Mfg. Co. v. Superior Drill Co., 56 Fed. 152; Palmer v. Mills, 57 Fed. 221; Norton v. Can Co., Id. 929; American Bell Tel. Co. v. Western Tel. Const. Co., 58 Fed. 410.

The general rule recognized in the text-books is that it is a matter of discretion whether an injunction pendente lite shall issue. "So far as preliminary injunctions are concerned," said Judge Brown, in Mill Co. v. Coombs, supra, "it is entirely well settled that, while the patent may be adjudged valid and the defendant an infringer, the award of an injunction is purely a matter of discretion, and courts are constantly in the habit of withholding it upon such terms, as the giving of a bond and the like, as may seem just and equitable, having regard to the comparative injury that will result to the par-

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ties by granting or withholding it." The question in that case was "whether, after an adjudication adverse to the defendant upon the merits of a patent case, [the court] ought to stay the issue of an injunction until the final decree"; and on a full discussion of the question, upon principle and upon authority, the injunction was granted, but with a stay of 20 days to enable the defendant to make necessary changes in the machinery of his mill to avoid infringement. In Campbell Printing-Press & Mfg. Co. v. Manhattan Ry. Co., supra, a decree "for account and injunction" was ordered, but with the qualification that the terms of the injunction be so settled as to provide from how many cars and locomotives the infringing couplings should be removed each week. Whether in this case, or in any case, there has been an abuse of discretion, is not a question which can be determined upon an application for a writ of mandamus.

The rule to show cause is denied, and the petition dismissed, at the costs of the petitioner.

(87 Fed. 801.)

SHOSHONE MIN. CO. v. RUTTER et al.

(Circuit Court of Appeals, Ninth Circuit. May 23, 1898.)

No. 413.

1. ADVERSE CLAIMS TO MINING LAND—JURISDICTION—FEDERAL QUESTION.
   A suit brought in pursuance of Rev. St. § 2326, based upon an adverse claim made upon the filing of an application for a patent for mining ground, is a suit arising under the laws of the United States, and is within the jurisdiction of the circuit court. 75 Fed. 37, affirmed.[1]
2. SAME—EQUITABLE OR LEGAL ACTIONS.
   Suits brought in pursuance of Rev. St. § 2326, to determine adverse claims to mining ground, are in their nature equitable, and not legal, actions. 75 Fed. 37, affirmed.
3. RELOCATION OF MINING CLAIM—EXTENDING LIMITS UNDER NEW NAME.
   A locator may relocate his mining claim, including additional vacant ground unclaimed by others, under a different name, and convey it by the designation of the last name.
4. RIGHT TO LOCATE MINING CLAIM—DISCOVERY OF LODE OR VEIN.
   Seams containing mineral-bearing earth and rock, discovered on a claim before its location, were similar to seams that had induced other miners to locate claims in the same district, and which by development had proved to be a part of a well-defined lode or vein containing ore of great value. *Held* a sufficient compliance with Rev. St. § 2320, requiring the discovery of a lode or vein within the limits of a claim before a valid location thereof can be made.

   Gilbert, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Idaho.

W. B. Heyburn, for appellant.

John R. McBride and Garber & Garber, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

[1] As to jurisdiction of cases involving federal questions, see note to Bailey v. Mosher, 11 C. C. A. 308.

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HAWLEY, District Judge. This is a suit in equity brought under the provisions of section 2326 of the Revised Statutes to determine the rights of the respective parties to certain mining ground situated in Yreka mining district, Shoshone county, Idaho. On August 21, 1895, appellant applied for a patent to the Shoshone lode claim. Appellees thereafter filed their protest and an adverse claim against said application, and in due time commenced this suit in support of their claim in the circuit court of the United States for the district of Idaho. Both parties are citizens and residents of the state of Idaho. A demurrer was interposed to the complaint, and overruled by the court. 75 Fed. 37. The cause thereafter came to issue, was tried upon its merits, and resulted in a decree in favor of the appellees. The questions presented by the demurrer will be first considered:

1. Appellant claims that the circuit court had no jurisdiction to try the case. Does the complaint in this case show upon its face that the suit is one arising under the laws of the United States? This question, under the repeated decisions of the courts in this and other circuits, has been, so far as we are advised, universally answered in the affirmative. Different grounds have been stated and different reasons assigned by the various courts, but the conclusion has always been the same,—that the circuit courts of the United States have jurisdiction to try all cases instituted under and by virtue of the provisions of section 2326 of the Revised Statutes, independent of the question of citizenship of the respective parties. Frank G. & S. M. Co. v. Larimer M. & S. Co., 8 Fed. 724; Cheesman v. Shreve, 37 Fed. 36; Doe v. Mining Co., 43 Fed. 219; Strasburger v. Beecher, 44 Fed. 209, 213; Burke v. Mining Co., 46 Fed. 644, 646; Wise v. Nixon, 76 Fed. 3, 6. But it is argued by appellant's counsel that all of these decisions have been virtually overruled by the decision of the supreme court in the case of Bushnell v. Mining Co., 148 U. S. 682, 13 Sup. Ct. 771. As we understand the decision in that case, no such question as is here presented was there raised, discussed, or decided. That action was brought in the state court, tried in the state court, and an appeal was taken to the supreme court of the state; and after a petition for rehearing was filed the losing party for the first time suggested that a federal question was involved, to wit, a construction of section 2322 of the Revised Statutes. The petition for rehearing being denied, a writ of error was sued out, and the case taken to the supreme court of the United States. The writ of error was there dismissed upon the ground,—to quote the language of the decision:

> "The attempt to raise for the first time a federal question in a petition for rehearing, after judgment, even assuming that the petition presented any such question, is clearly too late. It has been repeatedly decided by this court that a federal question, when suggested for the first time in a petition for rehearing, after judgment, is not properly raised, so as to authorize this court to review the decision of the highest court of the state."

No question was raised as to the competency of the courts, either national or state, to try a case brought under the provisions of section 2326. The only question at issue there, under the pleadings and at the trial, was as to the true course of the lode or vein. The in-

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structions referred to in the opinion had reference to that question only, which was solely a question of fact; and the court said that no federal question was involved,—that is, that no question was raised which called for any construction of section 2322. The other decisions that we have cited go directly to the point raised in this case. In Burke v. Mining Co., 46 Fed. 644, 646, the court said:

"It is claimed on one side, and denied on the other, that this suit, having been brought to determine the title to a mining claim, in pursuance to the requirements of section 2326 of the Revised Statutes, as amended in March, 1881 (1 Supp. Rev. St. p. 609), is for that reason a suit arising under the laws of the United States, within the meaning of the statute giving jurisdiction on that ground, irrespective of the character of the questions involved in the litigation. It seems to us that all the authorities, as they now stand, have determined the question in favor of the affirmative of this proposition."

In Jackson v. Roby, 109 U. S. 440, 3 Sup. Ct. 301, which was a suit brought in the circuit court of the United States for the district of Colorado in support of an adverse claim under the provisions of section 2326 of the Revised Statutes, the court disposed of the case upon its merits, and it is certainly fair to assume that it had no doubts as to its jurisdiction in the premises. In Chambers v. Harrington, 111 U. S. 350, 4 Sup. Ct. 428, it was claimed that a judgment rendered in a suit brought under the provisions of section 2326 of the Revised Statutes was not subject to review in the supreme court. The court said:

"But it is apparent that the statute requires a judicial proceeding in a competent court. What is a competent court is not specifically stated, but it undoubtedly means a court of general jurisdiction, whether it be a state court or a federal court; and as the very essence of the trial is to determine rights by a regular procedure in such court, after the usual methods, which rights are dependent on the laws of the United States, we see no reason why, if the amount in controversy is sufficient in a case tried in a court of the United States, or the proper case is made on a writ of error to a state court, the judgment may not be brought to this court for review, as in other similar cases."

The proceedings required to be commenced, under the provisions of section 2326, in a court of competent jurisdiction, may be brought either in the state or national courts, at law or in equity, as the facts may warrant; but section 2326 does not confer any special jurisdiction on the state courts. When the suits are brought and tried in the state courts, they are subject to the provisions of the state statutes in relation to such cases, and the courts proceed in the manner prescribed by such statutes. The proceedings in the national courts are regulated by the provisions of section 2326, as will more fully appear in the consideration of the next question involved herein. In several Pacific Coast states, statutes have been passed for the purpose of supplementing the provisions of section 2326, and the cases, when tried in the courts of such states, are controlled by such statutes, independent of any other provisions of the state statutes. Rose v. Mining Co., 17 Nev. 25, 52, 27 Pac. 1105; 2 Lindl. Mines, §§ 754, 755, and authorities there cited. In Steel v. Mining Co., 18 Nev. 87, 1 Pac. 450, the court said:

"These actions may be brought by the plaintiff, whether he is in or out of possession of the mining ground in controversy; and the only sensible con-

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struction of the law is that each party must prove his claim to the premises in dispute, and that the better claim must prevail."

Now, if there were no statute of the state specially providing for the trial of this class of cases, it might be that the state courts would not be able in all cases to try questions required to be heard and determined by section 2326, as amended. But, be that as it may, our conclusion is that, upon reason and authority, the circuit courts of the United States have jurisdiction to hear and determine the respective rights of the parties in controversies arising under the provisions of section 2326, if the property in controversy exceeds in value the sum of $2,000, independent of the question of the citizenship of the respective parties, or of the fact as to whether or not the case presents any federal question involving the construction of any other provision of the laws of the United States. In other words, that a circuit court of the United States is "a court of competent jurisdiction" to try such cases, within the meaning of those words as used in said statute.

2. The next point raised by the demurrer is "that it appears on the face of the bill that the plaintiff has an adequate remedy at law." The bill, among other things, alleges that the complainants long prior to August 20, 1895, were, "ever since have been, and now are the owners (subject only to the paramount title of the United States) and in the possession of that certain mine and mining claim containing a lode of rock in place, bearing silver, lead, and other valuable minerals and metals, situate in Yreka mining district, Shoshone county, state of Idaho, called the 'Kirby Fraction Lode and Mining Claim,'" which is particularly described by metes and bounds; that the defendant, claiming to be the owner of an alleged adjacent mining claim, called the "Shoshone Mining Claim," on or about the ——— day of August, 1895, wrongfully caused said Shoshone mining claim to be so surveyed as to crop upon and overlap the said Kirby Fraction lode mining claim, and to include a portion thereof, which is particularly described in the bill; that on or about the 24th day of August, 1895, the said defendant applied for a United States patent at the proper land office; "that in and by said application for patent the defendant set up and wrongfully alleged that it was the owner and in possession of the whole of said Shoshone mining claim, inclusive of the premises last above described, and of the lode therein, part of the Kirby Fraction lode and mining claim, and the property and in the possession of the complainants." The proceeding required, authorized, and directed by section 2326 of the Revised Statutes has no specific relation whatever to the action of ejectment, or to any other common-law action. The object of the proceeding is the determination of the contest in the land office, as to which of the parties, if either, is entitled to receive a patent from the government, —a right which arises out of a full compliance with the laws of congress for the acquisition of a government patent for mineral lands. The proceedings are purely statutory, and their inception is in the land office, not in the courts where the suit is commenced. As was said in Wolverton v. Nichols, 119 U. S. 485, 488, 7 Sup. Ct. 289, 291:

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"The proceedings in this case commenced by the assertion of the defendants' claim to have a patent issue to them for the land in controversy. The next step was the filing of an adverse claim by the plaintiffs in the land office, and the present suit is but a continuation of those proceedings, prescribed by the laws of the United States to have a determination of the question as to which of the contesting parties is entitled to the patent. The act of congress requires that the certified copy of the judgment of the court shall be filed in the land office, and shall be there conclusive. And we must keep this main purpose of the action in view, in any decision made with regard to the rights of the parties."

Whatever may be said of the nature and character of these proceedings when tried in the state courts, where the statutes have, as to the forms of action, abolished the distinction which exists in the national courts between law and equity, it must, we think, be conceded that such proceedings are of an equitable nature, and, when brought in the national courts, are to be tried as equity cases. The mere fact that in certain cases an action at law has been deemed sufficient does not change the equitable character of the suit. The suit is brought for special relief, and the judgment required to be entered is such as a court exercising jurisdiction in equity alone could render. This is clearly shown by the court in Hammer v. Milling Co., 130 U. S. 291, 296, 9 Sup. Ct. 548, where the court, in the course of its opinion, following the views expressed in Basey v. Gallagher, 20 Wall. 670, 679, said:

"The suitor, whatever relief he may ask, is required to state in ordinary, concise language, the facts of his case, upon which he invokes the judgment of the court; but the consideration which the court will give to the questions raised by the pleadings when the case is called for trial or hearing—whether it will submit them to a jury, or pass upon them without any such intervention—must depend upon the jurisdiction which is to be exercised. If the remedy sought be a legal one, a jury is essential, unless waived by the stipulation of the parties; but, if the remedy sought be equitable, the court is not bound to call a jury, and, if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. The decree which it must render upon the law and the facts must proceed from its own judgment respecting them, and not from the judgment of others. The court might therefore have heard this case and disposed of the issues without the intervention of a jury, but, it having called a jury, the trial was conducted in the same manner as a trial of an issue at law. Such is the practice under the system of procedure in the territory" (of Montana).

The determination of the rights of the parties, as required by section 2326, as we have already said, is not necessarily the subject of a common-law action; and a trial thereof on the equity side of the court is certainly not a violation of the provisions of the constitution, which declares that the right of trial by jury shall be secured to all and remain inviolate forever. The equity jurisdiction of the United States courts is not controlled by state legislation. In Perego v. Dodge, 163 U. S. 160, 16 Sup. Ct. 971, the court held that the amendatory act of March 3, 1881 (21 Stat. 505), was not intended to require, and does not require, all suits brought under section 2326 to be actions at law, and to be tried by a jury. In the course of the opinion, in reference to sections 2325 and 2326 the court said:

"Thus, the determination of the right of possession as between the parties is referred to a court of competent jurisdiction, in aid of the land office, but the

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form of action is not provided for by the statute; and apparently an action at law or a suit in equity would lie, as either might be appropriate under the particular circumstances,—an action to recover possession when plaintiff is out of possession, and a suit to quiet title when he is in possession."

The courts in this circuit have frequently entertained jurisdiction of suits in equity instituted under the provisions of section 2326. In Doe v. Mining Co., 43 Fed. 219, there is a clear enunciation of the principles applicable to this case, substantially in accord with the views herein stated. That case was affirmed in this court in 17 C. C. A. 190, 70 Fed. 458, 462. In Preston v. Hunter, 15 C. C. A. 148, 67 Fed. 996, counsel, being in doubt as to whether the suit should be classed as one in equity or an action at law, sent up two transcripts,—one upon appeal, as required in equity suits; the other upon writ of error, as required in actions at law. This court, without any discussion of the question, considered the case as an equity suit. It follows from the views herein expressed that the court did not err in overruling the demurrer to the bill.

3. This brings us to a consideration of the case upon its merits. It appears from the record that appellees first located a claim on a portion of the ground in dispute, under the name of the "Edith Mining Claim," and recorded the same; that thereafter, before any right of the appellant was made to the ground, the locators of the Kirby Fraction mining claim made a location "on top of the Edith," and also included more ground. These locations were made by the same parties. The Edith was located June 10, 1886, embracing 1,200 feet on the lode; the Kirby, on July 11, 1886, claiming 1,400 feet. Jacob Johns, one of the locators, testified that after the location of the Edith he found more ground, "and located another claim right over it. It was all our property, anyhow, so we located over it,—right over the top of the Edith. The location of the Edith was completed before the Kirby was located. * * * I intended to hold both the Edith and Kirby locations." In the conveyances made by the locators, they mentioned the Edith as well as the Kirby claim. Upon these facts appellant contends that, if the Edith location was valid, the Kirby location is void; that the appellees cannot recover upon the Edith title, because they have not set up any title to that claim in their bill; that they cannot recover upon the Kirby title without showing an abandonment of the Edith location. In considering these questions it must be remembered that the Kirby was located long prior to the Shoshone claim.. The evidence does not show that the ground covered by the Edith location was intended to be abandoned, but it does show that the original locators of the Edith concluded to change the boundaries by adding more ground, and gave a new name to their claim. The locators had the right to do this, as long as they did not interfere with the rights of other parties. The fact that the Edith was mentioned in the conveyances does not prove that the parties relied upon the title under that name. A conveyance of the ground by metes and bounds, by any name of the claim, would be valid and effective. The name is generally used to designate or identify the claim, but it may be designated or identified by the use of one, or

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more than one, name, if it is known or called by different names. There is no statute, law, rule, or regulation which prevents locators of mining claims from relocating their own claim, and including additional vacant ground, unclaimed by other parties, under a different name, and conveying it by the designation of the last name. In Weill v. Mining Co., 11 Nev. 200, 210, where the facts were in some respects similar to the case in hand, there were two locations made by the same parties, known, respectively, as the "Boston" and the "Lucerne." The Boston was located prior, and the Lucerne subsequent, to the location of the Waller's Defeat, owned by the plaintiff. The question was whether the defendant obtained any title to the Boston ground under a deed conveying the same by the name of the "Lucerne Company's Claims." The court said:

"If the Boston notice and the Lucerne notice were posted upon and claimed the same lode, a conveyance of his interest in the lode necessarily conveyed his interest in both locations, and it was immaterial by what particular name he designated it. Phillpotts v. Blasdel, 8 Nev. 61."

4. It is next claimed that there was no sufficient discovery made of any mineral, lode, or vein at the time the Kirby claim was located, and that for that reason the Kirby location was absolutely void. Upon this point there is some conflict in the evidence, but the weight and preponderance, in its entirety, clearly shows that at the time the location was made the locators had discovered a vein, or seams of rock in place, bearing minerals. The discovery was made in running a tunnel, where small seams of iron oxide, quartz, and small quantities of carbonate of lead were found, two or three inches wide. These indications were of such character as miners in that district would follow in the expectation of finding ore, and such as would justify miners in working a claim for that purpose. The rock in these seams was different from the country rock, and was of such character as is designated by the witnesses, who were practical miners, "as a vein containing rock in place, bearing minerals." These facts show that the location was made in good faith, and not "simply upon a conjectural or imaginary existence of a vein or lode," which cannot be permitted. King v. Mining Co., 152 U. S. 222, 227, 14 Sup. Ct. 510. The seams, containing mineral-bearing earth and rock, which were discovered before the location was made, were similar in their character to the seams or veins of mineral matter that had induced other miners to locate claims in the same district, which by continued developments thereon had resulted in establishing the fact that the seams, as depth was obtained thereon, were found to be a part of a well-defined lode or vein containing ore of great value. The discovery made at the time of the Kirby location was therefore such as to justify a belief as to the existence of such a lode or vein within the limits of the ground located. Erhardt v. Boaro, 113 U. S. 528, 536, 5 Sup. Ct. 560. The subsequent developments made after the claim was located, and before the location of the Shoshone, show more clearly the existence of a lode or vein. We are of opinion that the testimony on behalf of appellees is sufficient to show a compliance with the provisions of section 2320, which requires that there must be

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a discovery of a vein or lode within the limits of the claim before a valid location thereof can be made. In Book v. Mining Co., 58 Fed. 106, 120, the court, in construing this section of the statute, said:

"The words 'vein or lode,' in the last clause of this statute, were evidently intended to apply to such veins or lodes as were described in the first section, and to have the same meaning, viz. a vein or lode 'of quartz or other rock in place bearing gold, silver,' etc. This statute was intended to be liberal and broad enough to apply to any kind of a lode or vein of quartz or other rock bearing mineral, in whatever kind, character, or formation the mineral might be found. It should be so construed as to protect locators of mining claims, who have discovered rock in place, bearing any of the precious metals named therein, sufficient to justify the locators in expending their time and money in prospecting and developing the ground located. It must be borne in mind that the veins and lodes are not always of the same character. In some mining districts the veins, lodes, and ore deposits are so well and clearly defined as to avoid any questions being raised. In other localities the mineral is found in seams, narrow crevices, cracks, or fissures in the earth, the precise extent and character of which cannot be fully ascertained until expensive explorations are made, and the continuity of the ore and existence of the rock in place, bearing mineral, is established. It never was intended that the locator of a mining claim must determine all these facts before he would be entitled, under the law, to make a valid location. Every vein or lode is liable to have barren spots and narrow places, as well as rich chimneys and pay chutes, or large deposits of valuable ore. When the locator finds rock in place, containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim."

See, also, Migeon v. Railway Co., 44 U. S. App. 724, 737, 23 C. C. A. 156, and 77 Fed. 249; McShane v. Kenkle, 18 Mont. 208, 44 Pac. 979; Bonner v. Meikle, 82 Fed. 697, 703.

The purpose of the statute in requiring that "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located" was to prevent frauds upon the government by persons attempting to acquire patents to land not mineral in its character. But as was said in Bonner v. Meikle, supra:

"It was never intended that the court should weigh scales to determine the value of mineral found, as between a prior and subsequent locator of a mining claim, on the same lode."

The location of the Kirby was made in 1886. The discovery of mineral then made was sufficient to induce the locators and their grantees to perform the amount of annual labor thereon as required by the mining laws; to expend their time and money in prosecuting the work thereon, in the belief and expectation of finding ore of profitable value therein. The location of the Shoshone was not made until 1895. There is no good reason why the owners of the Kirby should be deprived of the discoveries made by them in prosecuting the work thereon after the location was made, and prior to the time of the location of the Shoshone claim. The court did not err in admitting the testimony upon this point. North Noonday Min. Co. v. Orient Min. Co., 1 Fed. 522, 531; Jupiter Min. Co. v. Bodie Consol. Min. Co., 11 Fed. 666, 676; Strepey v. Stark, 7 Colo. 614, 5 Pac. 111; Zollars v. Evans, 5 Fed. 172, 175; Patchen v. Keeley, 19 Nev. 405, 415, 14 Pac. 347.

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5. We have examined the objections made and exceptions taken by appellant to certain rulings of the court at the trial with reference to the annual assessment work done upon the Kirby claim in the years 1895 and 1896, and find no error therein.

6. Another case between the same parties was commenced in the state court, removed to the United States circuit court, and there tried as an equity suit, and, as it involved the title to the same mining ground, was consolidated, for the purpose of this appeal, with the case above disposed of. In the case brought in the state court, appellant claimed title to the mining ground under the Ibex location. The facts and circumstances as to the location of the Ibex claim are substantially the same as those pertaining to the Shoshone claim. Having arrived at the conclusion that the Kirby claim was a valid location, and it being prior in point of time to the others, it becomes unnecessary to notice any of the questions raised concerning the Shoshone or Ibex locations. The other questions are the same in both cases. The decree in each case is affirmed, with costs.

GILBERT, Circuit Judge (dissenting). In dissenting from that portion of the opinion which deals with the question of the jurisdiction, I am guided solely by what I conceive to be the purport of the decision of the supreme court in the case of Bushnell v. Smelting Co., 148 U. S. 682, 13 Sup. Ct. 771. I am unable to concur in the view that the only point decided in that case was that the suggestion of a federal question in a petition for rehearing after judgment comes too late. The jurisdiction of the supreme court in that case was invoked upon two grounds: First, that a federal question was presented upon the pleadings in the case and the instructions to the jury, since it was a case arising under section 2326 of the Revised Statutes; and, second, that a federal question was specially presented in the petition for rehearing which was filed in the supreme court of the state of Colorado, asserting rights under section 2322. The first question was inherent in the case, and appeared upon the face of the record. It required no presentation by petition or otherwise. It was in passing upon the second question that the court ruled that the attempt to raise for the first time a federal question in such a petition, after judgment, was too late. But in dealing with the other question the court said:

"It is plainly manifest that neither the pleadings nor the instructions given and refused present any federal question, and an examination of the opinion of the supreme court affirming the action of the trial court as to instructions given, as well as its refusal to give instructions asked by the defendants below, fails to disclose the presence of any federal question. It does not appear from the record that any right, privilege, or immunity under the constitution or laws of the United States was specially set up or claimed by the defendant below, or that any such right was denied them, or was even passed upon by the supreme court of the state; nor does it appear, from anything disclosed in the record, that the necessary effect in law of the judgment was the denial of any right claimed under the laws of the United States. The decision of the supreme court of Colorado in no way brought into question the validity, or even construction, of any federal statute, and it certainly did not deny to the plaintiffs in error any right arising out of the construction of the federal statutes."

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In so ruling upon that question the court had under consideration the very question which is before us in the case at bar, namely, whether the fact that a case arises under section 2326 presents, of itself, a question of the construction of a law of congress. The court expressly held that the pleadings suggested no federal question. The pleadings in that case contained the necessary averments and issues to determine the rights of the contesting claimants under section 2326. It so distinctly appears from the opinion. In that respect the case is identical with the case before us. In the present case there is no suggestion of a federal question, unless it be in the fact that the pleadings raise an issue under section 2326. The other questions which the record contains are similar to those which were submitted to the jury in Bushnell v. Smelting Co. The language above quoted from the opinion in that case applies with equal propriety to the case at bar. I find no allegation in the bill in the present case which suggests that a question arises under a federal statute, or that the right of either party to the suit will depend upon the interpretation to be given to such a statute. If there was no federal question in the case of Bushnell v. Smelting Co., there is none in this. The decisions in that case and in other recent cases in the supreme court have established the doctrine that the United States circuit courts cannot entertain jurisdiction of a cause upon the ground that it presents a question of a federal nature unless it clearly appears from the averments of the complaint or the declaration that in the progress of the trial, and preliminary to an adjudication, the right of the one or the other of the parties to the controversy will depend upon the construction to be given by the court to some provision of the constitution, laws, or treaties of the United States. Metcalf v. Watertown, 128 U. S. 586, 9 Sup. Ct. 173; Mining Co. v. Turck, 150 U. S. 138, 14 Sup. Ct. 35; Tennessee v. Union & Planters' Bank, 152 U. S. 454, 14 Sup. Ct. 654; Chappell v. Waterworth, 155 U. S. 102, 15 Sup. Ct. 34. The cases of Jackson v. Roby and Chambers v. Harrington, cited in the opinion of the majority of the court, are not in conflict with the foregoing views of the purport and effect of the decision in Bushnell v. Smelting Co. In Jackson v. Roby no question of the jurisdiction was raised, and it may be assumed that the case was one of which the court had cognizance, either upon the ground of the diverse citizenship of the parties, or the federal question suggested by the pleadings. The case of Chambers v. Harrington was in the supreme court upon appeal from a territorial supreme court, and hence no question of the jurisdiction could arise. The language of the court in that case, "And as the very essence of the trial is to determine rights by a regular procedure in such court, after the usual methods, which rights are dependent on the laws of the United States, we see no reason why, if the amount in controversy is sufficient in a case tried in a court of the United States, or the proper case is made on a writ of error to a state court, the judgment may not be brought to this court for review, as in other similar cases," is not inconsistent with the view that, in order that the case made shall be one of federal cognizance, the jurisdiction must be made to appear by a proper averment pointing to the statute

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which the court shall be called upon to construe. And if, indeed, any expression of the court found in the language so quoted can be construed as countenancing a different doctrine, it is certainly discredited by the later decisions of the supreme court to which reference has been made above.

(87 Fed. 810.)

BURDEN CENTRAL SUGAR-REFINING CO. v. FERRIS SUGAR-MFG. CO., Limited, et al.

(Circuit Court of Appeals, Fifth Circuit. April 12, 1898.)

No. 684.

COUNSEL FEES—SUIT AGAINST INSOLVENT CORPORATIONS—PAYMENT FROM GENERAL FUND.

The solicitors for a creditor commenced a suit against an insolvent corporation, in its behalf, and in behalf of all other creditors who might intervene and contribute to the expense, and procured the appointment of a receiver. Subsequently they carried on other litigation in the name of their client, but to the benefit of the creditors. *Held*, that they were entitled to compensation out of the general fund for the services rendered after, as well as those rendered before, the appointment of the receiver.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

On the 4th day of January, 1895, the complainant brought its bill against the Ferris Sugar-Manufacturing Company, Limited, and procured the appointment of a receiver thereof. The bill was brought in behalf of the complainant, a creditor of the corporation, and in behalf of all other creditors thereof who might join in the suit and contribute to the expense. The answer of the defendant company was a virtual confession of its insolvency. Since the appointment of the receiver the administration of its affairs has been conducted under the direction of the court a qua. A number of interventions have been filed by parties alleging themselves to be creditors of the defendant corporation, some of which resulted in protracted litigation, and were carried to the circuit court of appeals, and thence to the supreme court of the United States. On the 24th of May, 1897, it was ordered that the receiver and the complainant, and any other person claiming fees and allowances for themselves and their solicitors in this case, go before the master within 10 days from the date of the decree, and present their claims therefor. After hearing, the master reported, recommending the allowance of $5,000 as compensation for services rendered by Rouse and Grant, solicitors for the complainant, to be paid out of the fund brought into court. Exceptions were filed to the master's report by John H. Murphy, one of the interveners, and the Reading Iron Company, also an intervener; the exceptions being to the conclusion of the master that the fund was chargeable with the fees of Rouse and Grant, solicitors for the complainant, for services rendered after the appointment of a receiver; it being admitted that the fund was chargeable with the sum of $1,500 for their services up to and including the appointment of the receiver. The exceptions were argued and maintained in the court below upon the ground, as expressed in the opinion and decree, that the solicitors for the complainant are entitled to counsel fees, as against the receiver, only for services up to and including the appointment of the receiver, and that they are not entitled herein to counsel fees thereafter; and to that extent the court sustained the master's report, and maintained the same so as to fix the allowance of Rouse and Grant for counsel fees, to be paid out of the receivership, at the sum of $1,500. The complainant appealed from the decree, and made the following assignment of errors: (1) "Said circuit court erred in sustaining the exceptions to the master's report, when they ought to have been overruled, and the report confirmed." (2) "Said circuit court err-

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ed in holding that the appellants were entitled to be paid out of the fund impounded herein only the value of the services rendered by complainant's solicitors up to and including the appointment of the receiver, and not for services thereafter rendered on behalf of all parties in interest."

John D. Rouse and Wm. Grant, for appellant.

Chas. P. Fenner, Frank McCloin, and W. H. Saunders, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

SWAYNE, District Judge, after stating the facts, delivered the opinion of the court.

It is a familiar and well-established doctrine of equity that, where a suit has been instituted and carried on for the benefit of many, all who come in to avail themselves of the benefits of the decree obtained under the litigation shall bear their proportion of the expense. The bill in this case was filed, not only in behalf of the complainant, but of all other creditors of the defendant corporation who might join in the suit and contribute to the expense thereof. The exceptors to the master's report intervened in this case, and were admitted upon that condition, and therefore must pay their proportionate share of the expense of the litigation. One jointly interested with others in a common fund, who in good faith maintains the necessary litigation to save it from waste, and secures its proper application, is entitled in equity to the reimbursement of his costs, as between the solicitor and the client, either out of the fund itself, or by proportionate contributions from those who received the benefits of the litigation. Trustees v. Greenough, 105 U. S. 527; Railroad Co. v. Pettus, 113 U. S. 116, 5 Sup. Ct. 387; Hobbs v. McLean, 117 U. S. 567, 6 Sup. Ct. 870; Harrison v. Perea, 168 U. S. 325, 18 Sup. Ct. 129; Trust Co. v. Green, 24 C. C. A. 506, 79 Fed. 224. From the brief filed by the appellees, and from their oral argument at bar, the court understands their contention to be that it was the duty of the receiver to litigate these questions; and inasmuch as an allowance had been made to his counsel for services, out of the fund, therefore, complainant's solicitors should not receive anything after the appointment of the receiver. But it was the duty of the complainant to act in behalf of all creditors standing in a similar position, to see that their rights were protected in the final decree, and to prosecute the suit to a final distribution, and to defend and otherwise protect the fund. Having initiated the litigation on behalf of the creditors, it is his duty to prosecute it in the common interest to a termination, and to protect the fund, as far as he can, against unfounded claims for preference. He is made a party to the interventions. It has not been questioned that the complainant's solicitors conducted the litigation in this case from the filing of the bill to the final decree, and its solicitors appeared before the master, and contested all claims of the interveners, so far as they appeared to be without merit, and when they sought priority not thought to be sanctioned by law. One most important intervention, for a claim of about $26,000, was successfully defeated, partly through their efforts, the benefits of which went largely to the exceptors herein. It certainly must be admitted that the complainant had control of the

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litigation from the beginning to the end, and was not displaced by the appointment of the receiver, and that the receiver is only the hand of the court, to take and hold, for the purpose of its administration, the assets brought into court through process of the complainant, without right to have any voice in the conduct of the litigation. We think that the master was correct when he found that the services of complainant's solicitors rendered subsequently to the appointment of the receiver were for the benefit of the creditors, and to the interest of the fund brought into court, and therefore he should be paid out of the fund, and that the court, in sustaining the exceptions to the award of $5,000, as recommended by the master, was in error, and the decree should be reversed. It is therefore ordered that so much of the decree as awards the sum of $1,500 to complainant's solicitors, Grant and Rouse, for services up to and including the appointment of the receiver, is affirmed, and so much of said decree as overrules the allowance to them for said services after the appointment of the receiver is reversed, and the cause is remanded, with instructions to allow, after hearing the parties, such additional compensation for complainant's solicitors as may be proper and just for services rendered after the appointment of the receiver, in accordance with the above opinion.

(87 Fed. 813.)

GUARANTY TRUST CO. OF NEW YORK v. GALVESTON CITY R. CO.

(Circuit Court of Appeals, Fifth Circuit. April 19, 1898.)

No. 678.

RAILROAD MORTGAGES — PLEDGE OF BONDS AS COLLATERAL—MORTGAGE TRUSTEE.

A trust company, which was trustee under a railroad first mortgage, afterwards, in its individual capacity, made a loan to the railroad company, secured by a pledge of its second mortgage bonds. *Held*, that the trust company's right to sell the collateral according to the terms of the pledge was not affected by the fact that it had already commenced a foreclosure suit as trustee under the first mortgage, and that a receiver had been appointed in that suit, or by the fact that it had also become the owner of the majority of the first mortgage bonds.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

On the 11th day of October, 1897, the Guaranty Trust Company of New York, as trustee, presented to the Honorable David E. Bryant, in the United States circuit court for the Eastern district of Texas, a bill foreclosing a mortgage upon the Galveston City Railroad Company, appellee, for $1,000,000, principal, and interest, default having been made in the payment of the interest on the bonds issued in conjunction with said mortgage; and on the same day the court appointed a receiver, as prayed in said bill. On December 31, 1896, the Galveston City Railroad Company borrowed of the Guaranty Trust Company of New York, acting in its own right, the sum of $50,000, for which the railroad company executed its note of that date, payable on demand to appellant or order, and deposited as collateral security for said note 75 6 per cent. second mortgage bonds theretofore executed by the Galveston City Railroad Company; being a part of a series of $150,000 of second mortgage bonds secured by a second mortgage executed by the Galveston City Railroad Company to the United States

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Mortgage & Trust Company of New York, and subordinate to the first or consolidated mortgage previously executed to appellant as trustee. The note provided that, in case of the nonpayment of the same, appellant should be thereby authorized, at its option, to sell the said bonds, without notice, at public or private sale, with the right to purchase the same free from any equity of redemption, and to apply the net proceeds to the payment of the note, and all other indebtedness of the maker. Payment of the principal of the note was demanded, and the note protested, on October 8, 1897; and public advertisement was thereupon made that appellant would sell at auction the bonds deposited as collateral security as aforesaid, at the New York Real-Estate Sales Rooms, the usual place for sales of securities at auction in the city of New York, on October 13, 1897, and notice thereof was sent by telegraph to the appellee; but, upon telegraphic request of appellee's president, appellant postponed the sale. Afterwards, on or about November 15, 1897, the defendant having done nothing towards the payment of said note, appellant advertised said bonds for sale on December 1, 1897, and notified defendant of the time and place of such proposed sale. About November 19, 1897, appellee presented to Judge Bryant, in chambers, at Paris, a petition in this cause, setting forth a copy of the note; alleged the purpose of appellant to sell the bonds on December 1, 1897, in accordance with the notice before mentioned; alleged that the institution of this suit, and the appointment of the receiver herein, had tended to depreciate and impair the value of said second mortgage bonds held as collateral. It is also alleged that the property of appellee, if properly administered, was ample for both the first and second mortgage bonded indebtedness; that the second mortgage bonds so pledged were assets of appellee, and as such subject to the receivership in this cause; and that the sale thereof should not be allowed without the order of the court herein. It was also alleged that such sale would probably enable appellant to bid in the bonds at a nominal figure, and proceed against the property of the appellee for the deficit; that appellee would be irreparably damaged by the sale of said bonds; that the course of dealing between the parties had been such as to amount to an extension of said loan, but that, aside from that, appellants should not be allowed to take advantage of the situation, and dispose of said bonds at a depreciated price, resulting from its own action in obtaining the appointment of a receiver in this cause, etc. And the prayer was for an injunction prohibiting and restraining appellant from selling said bonds until the further order of the court. Upon this petition, Judge Bryant, on November 29, 1897, made an order granting the restraining order asked, with leave to appellant to at any time apply for dissolution of the same after five days' notice to appellee, and the restraining order issued accordingly. On December 13, 1897, appellant filed a motion to dissolve the restraining order for the reasons therein stated, and gave notice to appellee that it would present said motion to Judge Bryant, at Tyler, on the 3d day of January, 1898, or as soon thereafter as said judge could hear the same. In support of said motion, it filed an affidavit of Henry A. Murray, treasurer of appellant, which is set forth in the record (and from it it appears that appellant holds the note set forth in the appellee's petition for injunction, and the bonds therein referred to, as collateral), and stated the notice given, and the proceedings taken to sell the same, as hereinbefore shown, and that the bonds thus held as collateral were not assets of the appellee, but were its own obligations, and were not subject to the receivership in this cause, which extends only to the assets covered by the mortgage sought to be foreclosed herein. It is also denied that the course of dealing between the parties had been such as to amount to an extension of said loan, as stated in the petition for injunction. Subsequently, on January 5, 1898, appellee filed a reply to the motion to dissolve; and the court, after hearing, on the same day, refused appellant's motion to dissolve said injunction, and ordered that it be continued and made perpetual, which order was assigned as error; and an appeal was taken, and brought to this court.

R. S. Lovett, for appellant.
James B. Stubbs, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

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SWAYNE, District Judge, after stating the facts as above, delivered the opinion of the court.

It is difficult to understand upon what the appellee bases its right for an injunction in this case. In the suit for foreclosure, in which the receiver was appointed, appellant acted solely as a trustee for the bondholders, and its powers and status in that case was as such trustee only. It stands in the place of, and represents, the bondholders. It has no individual interest in the suit, further than the performance of its duties as trustee; proceeding solely in a fiduciary capacity, and in the interest of those it represents. The relief sought by the Galveston City Railroad Company by its petition herein is against the appellant individually. It does not grow out of its connection with the foreclosure of the mortgage. The indebtedness of $50,000 occurred nearly a year before foreclosure suit was commenced. Seventy-five second mortgage bonds to another corporation as trustee were pledged as collateral security for this loan. Appellant was given a right, by the terms of the pledge, to sell this collateral upon default in the payment of the debt. In this transaction appellant was acting in its own interest, as a lender of money. Upon what principle can it be claimed that its rights in respect to such transaction are in any way affected by the circumstance that it happened to be at the time a trustee named in a mortgage theretofore executed by the railroad company to secure an issue of bonds held by others? The foreclosure was commenced and prosecuted by the bondholders through their representative. That controversy is wholly between the bondholders and the railroad company, and the controversy between the railroad company and the appellant respecting this $50,000 loan is altogether foreign to the foreclosure proceedings. The bondholders are in no wise concerned in it, and their foreclosure proceedings cannot properly be modified or incumbered thereby. Neither does the charge made in the petition for injunction, that the foreclosure proceedings had impaired the value of the second mortgage bonds, have any effect on the rights of the appellant in this case. Its rights as the holder of the note and the collateral pledge to secure the same are wholly distinct from the right and action of the bondholders secured by the first mortgage now under foreclosure; and its right to proceed against the appellee upon its own claim could not be in any manner impaired or prejudiced by the action taken by the holders of the first mortgage bonds. Whatever position the second mortgage bonds might hold under other circumstances, their relation in this suit is that of a liability of the appellee, pledged to secure a debt to the appellant on a note which is overdue, and are not the bonds of some other corporation or person, owned by the railroad company, and subject to the control of the receiver. They are evidence of debt, not assets of the appellee. They have never been assets of the Galveston City Railroad Company. The right of appellant to sell the bonds pledged under the terms of the contract, and the powers confirmed by the terms of the pledge, were not in any way affected by the appointment of a receiver; nor were the position, character, or rights of the parties modified by the allega-

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tion that the appellants were the holders of the majority of the first mortgage bonds. The bonds may change hands; the trustee may be changed for cause; the receivership may extend for years. When, it might be asked, shall the appellant be permitted to realize on its collateral? The order granting the injunction is reversed, and the cause remanded, with instructions to the circuit court to dismiss the petition.

(87 Fed. 829.)

WARNER v. CITY OF NEW ORLEANS.

(Circuit Court of Appeals, Fifth Circuit. May 17, 1898.)

No. 691.

1. EQUITY—MAXIMS.

The city of New Orleans purchased the drainage system then in process of construction from the contractor; paying therefor in warrants, and covenanting not to obstruct or impede, but to facilitate by all lawful means, the collection and application of the drainage assessments to the payment of the warrants. The city abandoned the work, and the supreme court of the state decided that the assessments were not enforceable, because the abandonment of the work had rendered it a detriment, rather than a benefit, to the lands. Suit was brought against the city by a holder of the purchase warrants. *Held* that, under the maxim "that equity looks upon that as done which ought to have been done," the city must be treated as having done whatever was necessary to render the assessments available, and therefore as liable to account for the fund as if actually collected and in hand.

2. ESTOPPEL.

A city, by drawing warrants against a fund composed largely of assessments and judgments against itself as quasi owner of the streets and public squares, etc., is estopped to deny the validity of those assessments and judgments.

3. MUNICIPAL CORPORATIONS—ASSESSMENT OF CITY PROPERTY FOR LOCAL BENEFITS.

A city is liable for special assessments against itself for local benefits to its streets and other public places, regardless of the rule that public property is exempt from taxation.

4. SAME—INCREASE OF DEBT.

By an amendment to the Louisiana constitution, the city of New Orleans was prohibited from increasing its debt, except that it might issue drainage warrants under a certain contract then in process of completion. *Held*, that a purchase of works being built, and the issuance of warrants for the price, were within the exception.

5. SAME—POWER TO CONTRACT.

A municipal corporation which has enjoyed the fruits of a contract fairly made cannot, when called to account, deny the corporate power to make it.

6. LIMITATIONS.

A city bought property, and issued warrants against a fund in payment therefor, and undertook to collect the judgments and assessments belonging to such fund, and apply them to pay the warrants. *Held*, that the city could not avail itself of the plea of the statute of limitations against the holders of the warrants, based on the fact that the city had allowed the judgments to outlaw.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

The legislature of the state of Louisiana, by an act approved March 18, 1858, established a system of drainage of certain portions of the parishes of

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Orleans and Jefferson, which was to be carried on by boards of commissioners appointed for the three drainage districts into which the territory was divided. The commissioners were required to prepare plans of the proposed work, giving the names of the proprietors of the lands to be drained, which were to be filed in the mortgage office. The act further provided that notice of the filing of the plans should be given by publication, and that, upon the application of the commissioners to the courts specified in the act, judgments should be entered decreeing the lands subject to a first mortgage lien and privilege for such amount as might be assessed for drainage purposes. By a supplemental act approved March 17, 1859, the commissioners were authorized to borrow money to carry on the work. By another act, approved March 1, 1861, the prior acts were amended for the purpose of providing a mode of enforcing assessments when made, and for tnat purpose authorizing the commissioners to apply to certain courts for the approval and homologation of the assessment rolls, which approval and homologation the act declared "shall be a judgment against the property assessed and the owners thereof, on which execution may issue as on judgments rendered in the ordinary mode of proceeding." The commissioners made plans of the work proposed to be done, including therein the streets, squares, and public places within the several districts, as the property of the city of New Orleans; and from time to time judgments were rendered charging these public places, as well as private property, with the amounts that might be assessed for drainage purposes. Subsequently assessments were made, in some districts by the commissioners, and in others by the board of administrators of the city of New Orleans, which succeeded them under the act of 1871; and judgments were rendered for the amounts assessed against the lands and the owners, pursuant to the act of 1861. These assessments in every instance included the streets, squares, and public places, and the city of New Orleans, as the proprietor thereof. In 1871 the legislature, by Act No. 30 of that year, abolished the several boards of drainage commissioners, transferring all the assets and everything appertaining to the drainage districts to the board of administrators of the city of New Orleans, which was subrogated to all the rights and powers and facilities then possessed by the commissioners; and the board was directed to collect the balance due on assessments, as shown by the books of the First, Second, and Third drainage districts, "which said assessments are hereby confirmed and made exigible at such time and in such manner as the board of administrators may designate." The act further authorized the board of administrators to make other assessments, and required it to place all collections of drainage assessments to the credit of the Mississippi & Mexican Gulf Ship-Canal Company,—said company being the corporation charged under the act with the drainage work,—and hold the same as a fund to be applied to drainage purposes. Under these several acts, assessments were made against the city on the area of the streets and other public places within the drainage districts, and reduced to judgment, to the amount of $696,349.30, and against private persons to the amount of $1,003,342.28, of which about $230,000 has been collected from private property, in cash and drainage warrants; leaving outstanding at the date of the filing of the bill in this case uncollected assessments to the amount of $1,469,714.47, of which the city owes $696,349.30. The canal company carried on the work until 1872, when it transferred its franchise, drainage boats, and machinery to Warner Van Norden, who thereafter continued the work, receiving warrants against the drainage fund in payment of the amount earned. In 1876, after more than two-thirds of the drainage system had been completed, the legislature, by Act No. 16 of that year, authorized the city of New Orleans to acquire, if the council deemed it advisable, the property and franchise of the canal company, or its transferee, at a valuation to be affixed by appraisers to be appointed by itself; the price to be paid in warrants drawn against the drainage assessments. The same act granted the city the right and power thereafter to do all necessary drainage work, in case it should make the purchase. The city availed itself of this authority, and on the 6th day of June, 1876, made the purchase at an appraised value of $300,000, and issued drainage warrants to that amount to Van Norden for the price; covenanting in the act of sale not to obstruct or impede, but on the contrary to facilitate by all lawful means, the collection

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and application of the drainage assessments to the payment of the purchase warrants.

On this state of facts the complainant, as holder of $6,000 of these warrants, brings this suit. The bill, after reciting these facts, avers, in substance, that upon acquiring the drainage plant and franchises of the canal company the city abandoned all drainage work, and suffered the dredge boats and machinery purchased as above stated to decay and become valueless, and that by reason of the city's failure to complete the drainage and benefit the lands the courts have refused to enforce the collection of the assessments; that, having thus abandoned all drainage work, the city, by its ordinances and by a proclamation of the mayor, then advised property holders not to pay the assessments; and that in consequence of these ordinances and said proclamation, and the decisions of the courts, the drainage assessments became practically valueless and uncollectible. The bill further avers that the city had issued bonds in exchange for drainage warrants given for work, prior to the sale, under the authority of the act of the legislature of 1872, to an amount in excess of all the drainage assessments, which it will claim operated as a discharge of its liability as assessee of the streets, etc., and of all liability it may have incurred by any dereliction of duty in regard to the assessments against private property, but that this claim was not made known to Van Norden at the time of the purchase, and that he would not have parted with his property payable out of drainage assessments if he had known that such claim would be set up to defeat the payment of the price. The bill closes with a prayer for an accounting of the drainage fund, including the amounts due by the city, and the application thereof to the payment of the complainant's warrants, and those held by others similarly situated who may come in and avail themselves of the benefit of the bill.

To this bill the defendant filed a demurrer, both general and special, assigning for cause (1) want of jurisdiction in the circuit court; (2) want of equity in the bill; and (3) that the matters sought to be litigated had been decided adversely to the complainant's pretensions in the case of Peake v. City of New Orleans, 139 U. S. 342, 11 Sup. Ct. 541. The demurrer was sustained and the bill dismissed by the circuit court, and the cause was removed here on the appeal of the complainant. This court, being in doubt as to the application in Peake v. City of New Orleans, supra, to the case made by the bill, certified the following questions to the supreme court for advice and instructions: "First. Is the city of New Orleans, under the warranties, express and implied, contained in the contract of sale of June 7, 1876, by which she acquired the property and franchise from Warner Van Norden, and under the averments of the bill, estopped from pleading against the complainant the issuance of bonds to retire $1,672,105.21 of drainage warrants issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property, and as a discharge of her own liability to that fund as assessee of the streets and squares? Second. Should the decision in the case of Peake v. City of New Orleans, 139 U. S. 342, 11 Sup. Ct. 541, be held to apply to the facts of this case, and operate to defeat the complainant's action?" The court declined to answer the second question, on the ground that it practically submitted the whole case, but answering the first, after reciting the facts, said: "And now the question is whether the city is not estopped to plead in defense of liability on these drainage warrants the fact of prior issue of bonds to a larger amount than that assessed against the areas of its streets and squares, and collected from private property. We think this question must be answered in the affirmative. The city, in respect to the purchase of this property from the canal company and its transferee, and in the obligations assumed by the warrants issued, acted voluntarily. It was not in reference to these matters, as it was to those considered in Peake v. City of New Orleans, 139 U. S. 342, 11 Sup. Ct. 541, a compulsory trustee, but a voluntary contractor; and the proposition which we affirm is that one who purchases property, contracting to pay for it out of a particular fund, and issues warrants therefor payable out of that fund,—a fund yet partially to be created, and created by the performance by him of a statutory duty,—cannot deliberately abandon that duty, take active steps to prevent the further creation of the fund, and then, there being nothing in the fund, plead in defense to a lia-

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bility on the warrants drawn on that fund that it had, prior to the purchase, paid off obligations theretofore created against the fund. Whatever equity may do in setting off, against all warrants drawn before this purchase from the canal company and its transferee, the bonds issued by the city (and in respect to that matter we can only refer to Peake v. City of New Orleans, supra), it by no means follows that the city can draw new warrants on the fund in payment for property which it voluntarily purchases, and then abandon the work by which alone the fund could be made good, resort to means within its power to prevent any payments of assessments into that fund, and thus, after violating its contract promise not to obstruct or impede, but on the contrary facilitate by all lawful means, the collection of the assessments, plead its prior issue of bonds as a reason for evading any liability upon the warrants. One who purchases property, and pays for it in warrants drawn upon a particular fund, the creation of which depends largely upon his own action, is under an implied obligation to do whatever is reasonable and fair to make that fund good. He cannot certainly so act as to prevent the fund being made good, and then say to his vendor, 'You must look to the fund, and not to me.' We are clear in the opinion, therefore, that the first question must be answered in the affirmative." Warner v. City of New Orleans, 17 Sup. Ct. 892. Being thus advised, and being satisfied that the complainant was entitled to the relief prayed, this court itself answered the second question in the negative, reversed the decree appealed from, and directed the circuit court to overrule the demurrer. See Warner v. City of New Orleans, 26 C. C. A. 508, 81 Fed. 645. The city subsequently filed an answer at great length, admitting that judgments were rendered against it, as alleged in the bill, for the amount assessed against the streets, squares, and public places, but alleged that the assessments first levied by the commissioners, and afterwards extended by the board of administrators to the city, were null and void because levied on public property exempt from taxation, and that the judgments against the city therefor were for the same reasons also void. The answer further alleges that the city has performed its full duty in relation to the collection of assessments against private property, but admits that the proclamation referred to in the bill, advising property owners not to pay drainage assessments, was issued by the mayor under authority of an ordinance of the city. It further alleges that the drainage plans made by the canal company were so defective that their completion would have been of no benefit to the property attempted to be drained; that the work done under them was also defective and of no value, and that for these reasons the city was justified in suspending the further prosecution of the work, which resulted in the decision of the supreme court in the case of Davidson v. City of New Orleans, 34 La. Ann. 170, declaring judgments for drainage assessments void for failure of consideration; and that this decision has become the settled rule of law in the state, rendering further collections impossible, but that notwithstanding this decision the city has constantly and at all times endeavored in every way possible to realize the assessments. And the city files an account showing the collections made in 1871 to June 20, 1891, inclusive, and the disposition thereof, as a sufficient compliance with its duty as a trustee. In conclusion the city pleads the appointment of a receiver for the drainage fund by the circuit court, and the prescription of five and ten years in bar of the bill, and the issuance of the bonds under the act of 1872, as a discharge from all liability, and the decision in Peake v. City of New Orleans as res adjudicata on all the issues in the case.

Richard De Gray, Wm. Grant, and John D. Rouse, for appellant.
Branch K. Miller and Samuel L. Gilmore, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

SWAYNE, District Judge (after stating the facts as above). As to nearly all of these defenses, we might well rest our decision in this case on the opinion of the supreme court expressed in answer to the certified question. All the facts averred in the bill have either been

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admitted by the answer, or abundantly established by evidence. Indeed, the only fact in dispute between the parties is the question of responsibility for the alleged defects in the drainage plan. So far, however, as the answer attempts to fasten this responsibility on the canal company and Van Norden, its transferee, as a defense to this action, it is entirely unsupported by the evidence, as the counsel for the city very frankly admitted in their argument at the hearing. The general plan under which the work was undertaken by the contractor was prescribed by the legislature in the act of 1871, which directed the canal company to dig canals above, below, and in the rear of the city, and with the earth removed therefrom to build levees to protect the city from overflow, and to dig such interior canals as might be necessary for the drainage of the city and the lands in the rear; but the right to prescribe the location and number of all the canals was expressly vested in the city. As a matter of fact, the city, through its ordinances, based on the recommendation of the city engineer, located each of the canals that were excavated, and exercised direct supervision over the work, which the assistant engineer having charge of the work says was done strictly in accordance with the specifications furnished by the contractor, and well done. The principal objections made to the plan by some of the eminent engineers who have testified are that it was not sufficiently extensive to meet the future requirements of a growing city like New Orleans, that it did not provide the number of interior canals necessary to hold and carry off the excessive rainfall, and that the method of discharging the drainage water by means of pumps into the lake was too expensive, and was wrong from a sanitary point of view. Testifying by the light of experience and investigation made by them since 1871, they give it as their opinion that a greater number of canals should be excavated than called for by the plan, and that the drainage ought to be discharged into Bayou Bienvenue, some distance below the city proper, through the main canal, by means of a series of pumping stations. Other engineers of equal reputation—notably, Mr. Bell, who, as engineer of the city in 1871, devised the plan now condemned, and the present city engineer, and others—testify that the plan was a good one, and, if carried out, would have accomplished the drainage of the city. The cost of completing the work after the city purchased the drainage plant, as testified to by some of the witnesses for the defendant, would have been about $500,000, if paid for in cash, and not in warrants. But it now appears that a new plan of drainage has recently been adopted, which, incorporating and using all the old works, is estimated to cost about $8,000,000. Without commenting further on the evidence on this part of the defense, our conclusion is that the plan under which the work was done by the canal company and its transferee would, if carried out as contemplated, have sufficiently accomplished the drainage of the lands within the several districts to render the assessments available, if the city had kept the work in serviceable condition after its completion, as the law required. It is a singular fact that, while the answer in this case charges the failure of the drainage to the alleged defective plan and the work of the contractor, the principal ground of the decision in Davidson v. City

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of New Orleans, 34 La. Ann. 170, for annulling the judgment for one of these assessments, is that the city had abandoned the work, without any probability of renewing it, so that the work, in its incomplete state, was a detriment, rather than a benefit, to the lands. The failure of consideration which worked the destruction of the drainage fund was therefore, as adjudged by the supreme court of the state, caused directly by the fault of the city. Its conduct in this and other respects was a violation of its duty as a trustee, and was a breach of the covenant contained in the act of purchase, "not to obstruct or impede, but on the contrary to facilitate by all lawful means, the collection of the drainage assessments." Treating the city, therefore, as a trustee, under an express duty to do whatever was reasonably required to make the drainage fund available for the purpose of paying the purchase warrants, a court of equity will apply the maxim "that equity looks upon that as done which ought to have been done." "The true meaning of this maxim is that equity will treat the subject-matter, as to all collateral consequences and incidents, in the same manner as if the acts contemplated by the parties had been executed exactly as they ought to have been. * * * They are also deemed to have the same consequence attached to them, so that one party, or his privies, shall not derive benefit by his laches or neglect, and the other party, for whose profit the contract was designed, shall not suffer thereby." 1 Story, Eq. Jur. § 64g. The city must therefore be treated as having done whatever was necessary to render the assessments available, and should be held to account for the drainage fund, as if collected and in hand.

It is claimed, however, that the city is not bound to account for the assessments and judgments against itself, as the quasi owner of the streets and other public places, on the ground that such assessments and judgments should be considered void ab initio, for the reason that public property is exempt from taxation. But we think the city, by drawing these warrants against the drainage fund, composed largely of these very assessments and judgments, is, under the principles laid down by the supreme court in the present case, estopped to deny their existence and validity, to the same extent that it is estopped from setting up the issue of bonds under the act of 1872 as a discharge of its general liability as trustee with reference to the fund. As an original question, however, the authorities seem to affirm the liability of a municipal corporation for its proportion of the cost of local improvements, independently of the existence of any estoppel. In Re New Orleans Drainage Co., 11 La. Ann. 338, the supreme court of Louisiana held the city of New Orleans liable for assessments made on the area of the streets under the act of 1835, which is similar in all respects to the acts involved here, except that the assessments in that case had not been ratified by the legislature, as was done in this instance by the act of 1871. This case has since been commented upon and affirmed in Marquez v. City of New Orleans, 13 La. Ann. 319, and Correjolles v. Succession of Foucher, 26 La. Ann. 362, and in Paving Co. v. Gogreve, 41 La. Ann. 259, 5 South. 848. The matter of local assessments has been the subject of judicial inquiry in other states, notably by the supreme court of Illinois in the case of County

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of McLean v. City of Bloomington, 106 Ill. 209, where all the objections raised in this case have been elaborately considered, and decided in harmony with the case above quoted. Says the court in that case:

"The objections may be included under three heads: First, that public property is exempt from special assessments; second, that the statute under which the state is proceeding does not authorize any assessments against the property of the county; third, that the judgment cannot be enforced by the sale of the property, and no other mode of enforcing such judgments can be resorted to. It is not claimed the first objection has the direct sanction of the statutes in its support, but the contention is such property is expressly exempt from taxation, and special assessments are included within the meaning of the word 'taxation.' We have been too long and too firmly committed to the doctrine that exemption from taxation does not exempt from special assessments to now admit that it is even debatable. * * * The distinction between taxation and special assessments is also clearly made in our present constitution, and while providing that the general assembly may exempt the property of the state, counties, and other municipal corporations from the former, makes no such provision in regard to the latter, but on the contrary * * * authorized the general assembly to vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, without any restriction as to the property to be assessed. The second objection rests entirely on the assumption that, to include the property of counties, it should be expressly named, and that language, however comprehensive, in general terms only, is not sufficient. The rule held by this court is directly the reverse of this assumption. The exemption, and not the inclusion, must specifically appear. * * * The question relates solely to the right of the state to apportion the public burden upon public property, in common with private property, in proportion to the benefit conferred upon that property. The remaining question, we think, involves no serious difficulty, although at first blush it may seem to do so. We certainly do not hold the court-house square may be sold, and title passed to private parties or to the city. In Taylor v. People, 66 Ill. 322, we held that in such cases the amount should be paid out of the treasury. The distinction here made between taxes and local assessments has been fully recognized by the supreme court of Louisiana in Charnock v. Levee Co., 38 La. Ann. 326, and in Paving Co. v. Gogreve, 41 La. Ann. 263, 5 South. 848, where the Drainage Case in 11 La. Ann. 338, is cited with approval."

Whether the obligation for these drainage assessments had its origin in the original acts of 1858, 1859, and 1861, or was cast upon the city by the act of 1871, confirming the assessment rolls, upon which the city was named as a debtor, or results from judgments based on these rolls, the amount of the assessments constitutes a lawful debt of the city, which must be discharged by the exercise of the power of taxation; such power being the usual, and in most instances the only, method by which municipal corporations can discharge their indebtedness. U. S. v. City of New Orleans, 98 U. S. 381; Wolff v. City of New Orleans, 103 U. S. 358.

It is urged, however, that the contracts of purchase made in 1876 are null and void, because they operated to increase the debt of the city, in violation of the amendment of the constitution of the state adopted in 1874. This assumption is based on the theory that assessments against the city were at that time void, and that to now enforce them would be to increase the city debt. It is said, also, that the city was not at that time the primary debtor for assessments against private property, and that, if the court should now impose a liability on the city for the dereliction of duty charged in the bill,

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it would create a new debt, which will come within the prohibition. We cannot concede the correctness of this argument. It is true the amendment prohibited any increase of the city debt after January 1, 1875; but it also expressly provided that it should not prevent the issue of drainage warrants to the transferee of the contract, under Act No. 30 of 1871, payable out of the drainage taxes. But it seems clear to us that by express terms the amendment excludes, and intended to exclude, from its operation, the liability of the city growing out of its relation to drainage matters, including the city's liability as assessee of the streets and public places, as shown by the assessment rolls. Indeed, it would seem that the authority to issue warrants against the drainage fund after that date necessarily implied an affirmance of the right of the city to proceed to the completion of the drainage work then in progress, and imposed a corresponding duty on the city to collect and apply all the drainage assessments to the payment of the warrants. These taxes, being then liabilities of the city, cannot by any cause or reason be included in the clause prohibiting an increase of the debt of the corporation without imputing to the authors of the constitution an intent to defraud those who might deal with it under the invitation of the constitution. We cannot give to the organic law of the state a construction so repugnant to honesty and good morals; nor do we believe the legislature, in authorizing the city to purchase the property of the transferee of the canal company, nor the city, in making the purchase for the purpose of carrying on and completing the drainage, contemplated defrauding the vendor by invoking any such inequitable construction. Even admitting that the purchase created a debt in excess of the limitation, the most that can be said is that it was made in error of law, which, according to article 1846 of the Civil Code of Louisiana, cannot be alleged to acquire the property of another. This principle is embedded in the civil law, as shown by the learned disquisition of D'Auguesseau, to be found in the second volume of Poth. Obl. p. 350. The same principle is recognized by the supreme court in Railway Co. v. McCarthy, 96 U. S. 258, in which the court says that a corporation, having enjoyed the fruits of a contract fairly made, cannot, when called to account, deny the corporate power to make it.

The only remaining question which requires consideration is the plea of prescription, and that, we think, cannot be maintained. The act of sale created an express trust, in which the city undertook, as a trustee, to collect and apply the drainage assessments to the payment of the warrants given for the price of the property sold to it. This trust was a continuing and executory one, and the universal rule in such cases is that the statute of limitations is not set in motion until the trustee has disavowed the trust, and notice of his repudiation has been brought home to the cestuis que trustent. Perry, Trusts, § 24; Lewis v. Hawkins, 23 Wall. 119. This rule has been expressly recognized and applied by the supreme court of Louisiana in Insurance Co. v. Pike, 32 La. Ann. 483, where it is held that prescription against the right to demand an accounting begins to run only from the date of the last act performed by the trustee with reference to the trust. In that case the act which was held to be a recognition of the

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trust consisted of a credit entry, for money collected, made by the defendant in the books of the insurance company, of which he was treasurer. In the present case the city alleges in its answer that it has constantly endeavored, by suits and otherwise, to collect the drainage assessments, thus affirming the trust, and has filed an account showing the collection of the assessments up to June 20, 1891, —only three years prior to the date of the bill filed. Notwithstanding these facts, it is still insisted that the judgments against the city are prescribed, under the laws of the state, because they have not been revived within 10 years since their rendition, even if the city has continued to act as trustee up to the time of the filing of the bill. We cannot understand upon what theory the city can claim a release from its indebtedness to the drainage fund by pleading its own neglect to revive the judgments, if the proceedings to revive were necessary to keep them in force. Such a pretension has neither the sanction of reason nor authority. On the contrary, the maxim, "Contra non valentem," is universally applied as between a trustee and an estate represented by him. And so in this state it has been held that neither a claim of an administrator against the estate he represents, nor the claims of the estate against him, are subject to prescription, as long as he remains a trustee. In re Farmer, 32 La. Ann. 1037; McKnight v. Calhoun, 36 La. Ann. 408. The reason given by the court for the application of the maxim in these cases is that an administrator, from the very nature of things, cannot sue himself, if a debtor to the estate, nor sue the estate, of which he is the sole representative, if he is a creditor. Moreover, it is doubtful whether statutory assessments of the character in question are subject to any prescription at all. Indeed, the supreme court of the state has held in Reed v. His Creditors, 39 La. Ann. 115, 1 South. 784, citing State v. Jackson, 34 La. Ann. 178, and Davidson v. Lindop, 36 La. Ann. 765, that, tax laws being sui generis, the prescription of the Civil Code does not apply to them, from which it may be taken, as a general rule in such matters, that, unless a law under which an assessment is levied provides a limitation, none exists.

On a full consideration of the case, we think the decree appealed from should be reversed, and that a decree should be entered by the circuit court in favor of the complainant for the sum of $6,000, with 8 per cent. interest from June 6, 1876, as stipulated in the warrants sued on, and that an account should be taken of all the drainage assessments, including those reduced to judgments against the city as assessee of the streets, squares, and other public places, as well as the assessments against private property and persons, allowing credits for the amounts heretofore collected and properly expended, but without allowing for the bonds issued under the act of 1872. Opportunity should be given the holders of outstanding purchase warrants of the character of those held by the complainant to come before the master on the invitation contained in the bill, and make proof of the amounts due them; and they should be admitted to share in the trust fund, upon offering to contribute to the cost and expenses of the litigation. In accordance with these views, and to prevent any unnecessary delay arising from a misunderstanding of the findings now and

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heretofore expressed by this court and the supreme court, the circuit court is directed to enter a decree as follows:

"(1) It is decreed that the city of New Orleans is a debtor to John G. Warner, complainant, in the sum of $6,000, with 8 per cent. interest thereon from June 6, 1876, as stipulated in the warrants sued on, and that he is entitled to be paid said sum, in principal and interest, out of the drainage assessments set forth in the bill filed herein.

"(2) The said drainage assessments, including those against the defendant as assessee of the streets, squares, and public places, as well as those against the owners of private property, be, and the same are hereby, declared to constitute a trust fund in the hands of the city of New Orleans for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Warner Van Norden, transferee to said city, under authority of Act No. 16 of the legislature of the state of Louisiana, approved February 24, 1876.

"(3) That it be referred to one of the masters of the court to take and state an account of all said drainage assessments, and for that purpose he is authorized to require the production before him of the assessment rolls and other records appertaining to such drainage assessments, by any person having possession thereof, and to examine witnesses touching all such matters. In taking and stating such account the master is directed to charge the defendant as well with the amount of drainage assessments against the city, the area of the streets, squares, and public places, as with those against the owners of private property, with interest thereon as prescribed by law, and to give credit only for the sums already collected and properly expended by the defendant in the execution of the trust, but that no offset be allowed for the bonds issued in exchange for drainage warrants under the act of 1872.

"(4) It is further ordered that said master give 30 days' notice, by advertisement in a newspaper published in New Orleans, to all holders of warrants issued as aforesaid, to appear before him and establish their claims. And it is further ordered that said warrant holders be entitled to establish their claims before the master in the first instance, without being required to file formal interventions, or to obtain special leave of court, and that they be entitled, upon making satisfactory proof, to the full benefit of the proceeding.

"(5) It is further decreed that upon the coming in of the master's report, and its confirmation, the complainant and all those who have established claims under the fourth clause of this decree will be entitled to an absolute decree against the defendant for the amounts found due them, if the fund established by the accounting shall be sufficient, but, if not sufficient to pay such claims in full, then for the proper pro rata thereof, and shall be entitled to have execution thereof. It is further ordered that the complainant and all other parties in interest have leave to apply to the court for such other and further orders as may be necessary, from time to time, to carry this decree into full effect, and that the defendant pay all costs of this suit."

For the purpose of awarding the relief to which the complainant is entitled, the decree appealed from is reversed, at the costs of the ap-

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pellee, with directions to the circuit court to enter the decree herein prescribed, and otherwise to proceed in the cause in accordance with this opinion.

(87 Fed. 839.)

GREEN v. CITY OF LYNN, MASS.

(Circuit Court of Appeals, First Circuit. April 1, 1898.)

No. 240.

APPEAL AND ERROR—TIME OF TAKING PROCEEDINGS.

Under Act March 3, 1891 (26 Stat. 829, c. 517, § 11), an appeal to the circuit court of appeals must be taken within six months after the entry of the decree sought to be reviewed. *Held*, that the filing of the petition for appeal, and assignments of error, in the office of the clerk of the circuit court within the statutory period, was not sufficient.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This case was heard in the circuit court upon the pleadings and proofs; and thereupon a final decree was entered on February 23, 1897, for the complainant, decreeing letters patent, reissue No. 4,372, dated May 9, 1871, to Nelson W. Green, for improvement in methods of constructing artesian wells, to be a good and valid patent, and that the complainant recover from the defendant, as profits from its infringement of said patent, $11,425.87, with interest thereon from the date of the master's report to the date of the entry of the final decree, amounting to $508.45, and costs of suit, amounting to $2,407.52, and also decreeing letters patent No. 218,875, dated August 26, 1879, to Nelson W. Green, for improvement in water-supply system for cities, etc., to be void for want of novelty, and that the bill be dismissed as to that patent. The defendant, the city of Lynn, appealed from this decree of the circuit court; and its appeal was duly entered in this circuit court of appeals, and is here pending, being numbered and entitled: No. 220. City of Lynn v. Green. The complainant, Nelson W. Green, also appealed from the decree of the circuit court, and his appeal was duly entered in this circuit court of appeals, being numbered and entitled: No. 240. Nelson W. Green v. City of Lynn. This report relates only to the appeal of Nelson W. Green, No. 240. The record upon the appeal of Nelson W. Green was filed and the case docketed January 21, 1898, and was heard February 12, 1898, on motion to dismiss the appeal.

Bowdoin S. Parker, for appellant.

Robert F. Herrick and Guy Cunningham, for appellee.

Before WEBB, ALDRICH, and BROWN, District Judges.

PER CURIAM. We are of the opinion that this appeal was not taken within six months after the entry of the decree sought to be reviewed, as required by the act of March 3, 1891 (26 Stat. 829, c. 517, § 11), and that for this reason we have no jurisdiction thereof. The date of the entry of the decree in the circuit court was February 24, 1897. The six-months period expired August 24, 1897. The petition for an appeal, with the assignment of errors, was filed in the office of the clerk of the circuit court August 17, 1897. Nothing further was done within the six-months period. December 11, 1897, the following indorsement was made upon the petition: "Memorandum. This appeal is allowed, although I doubt whether it was seasonably perfected. W. L. Putnam, U. S. Circuit Judge." On the

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same day Judge Putnam signed a citation dated December 11, 1897, and approved an appeal bond dated November 2, 1897.

In Barrel v. Transportation Co., 3 Wall. 424, a petition for an appeal had been filed in due time in the office of the clerk of the circuit court. Nevertheless the court said:

"The filing of it in the clerk's office, even if it could be regarded as addressed to the circuit court, would be of no avail, unless accompanied by an allowance of an appeal by that court."

See, also, Pierce v. Cox, 9 Wall. 786.

Though the supreme court has often said that signing a citation or approving a bond is equivalent in law to the allowance of an appeal, it has never said, so far as we can discover, that an allowance in some form could be dispensed with, nor intimated that the limitation of time could be disregarded, and allowance made after its expiration be effectual. The act of March 3, 1891, by its provisions recognizes the necessity for an allowance; and the uniform practice of filing both the petition and the allowance before the expiration of the statutory period seems to be in accordance with the views of the supreme court as to the essential requirements which must be complied with before an appeal can be said to be "taken." In Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771, it is said:

"And so, when a cross appeal is allowed by a justice of this court, the petition and order of allowance must be filed in the court below, in order to the due taking of the cross appeal, under the statute."

See, also, Credit Co. v. Arkansas Cent. Ry. Co., 128 U. S. 258, 261, 9 Sup. Ct. 107; Edmonson v. Bloomshire, 7 Wall. 306; Evans v. Bank, 134 U. S. 330, 10 Sup. Ct. 493; Brooks v. Norris, 11 How. 204; The Dos Hermanos, 10 Wheat. 306; Seymour v. Freer, 5 Wall. 822; Yeaton v. Lenox, 7 Pet. 220; The Enterprise, 2 Curt. 317, Fed. Cas. No. 4,497; Warner v. Railway Co., 4 C. C. A. 670, 54 Fed. 920, 922.

The appeal is dismissed, and the costs of this court are adjudged to the appellee.

(87 Fed. 843.)

WILDER et al. v. CITY OF NEW ORLEANS.

(Circuit Court of Appeals, Fifth Circuit. April 12, 1898.)

No. 409.

1. DRAINAGE WARRANTS—APPOINTMENT OF RECEIVER—LIABILITY OF CITY.

By Act La. No. 30, 1871, the board of administrators of the city of New Orleans was authorized to make and collect drainage assessments, and hold the amount collected in trust for the payment of warrants issued for drainage work done by parties to whom the whole drainage work was by said act intrusted. June 7, 1876, by authority of Act No. 16, 1876, the city purchased the drainage franchise and property for $300,000, and issued drainage warrants therefor. In 1891 a receiver was appointed by the circuit court, to whom the city transferred the assets and property of the drainage fund. *Held*, that holders of warrants issued for such purchase are not restricted for their payment to funds in the hands of the receiver, but are entitled to a judgment against the city, to be paid out of the drainage taxes collected by it.

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2. APPOINTMENT OF RECEIVER—ABATEMENT OF PENDING ACTIONS.

The appointment of a receiver of the property of a debtor does not abate personal actions pending against the debtor, and, as to such an action, the receiver has no status in court until made a party thereto on his own application; the plaintiff having a right to proceed to final judgment without him.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

On June 5, 1886, plaintiffs brought an action at law for the recovery of $7,000, with interest, the amount of two drainage warrants, one for $2,000 and one for $5,000, both dated June 6, 1876, executed by the administrators of public accounts and finances of the city of New Orleans. The petition alleged that the city of New Orleans was bound for the payment of these two obligations under the laws and ordinances under which they were issued, and the benefits derived by the city from the drainage work done under Act No. 30 of 1871. By Act No. 30 of 1871, the whole work of drainage was confided to the Mississippi & Mexican Gulf Ship-Canal Company, and all the moneys and assessments, real estate, books, plans, tableau, and judgments of the drainage commissioners were transferred to the board of administrators of the city of New Orleans, which was subrogated to all the rights and powers theretofore possessed by the said commissioners. By the same act the assessments made by the commissioners were expressly confirmed and made exigible; and the board of administrators were also authorized to make further assessment, and to collect all of such assessments, and hold the amount collected in trust for the payment of warrants issued as provided in the act for drainage work. The work was carried on by the canal company until 1872, after which, and until June 6, 1876, the work was prosecuted by Warner Van Norden, who had become the transferee of the franchise and property of the canal company. In 1876 the legislature passed Act No. 16, authorizing the city of New Orleans to purchase the franchise, dredge boats, etc., from Van Norden, transferee of the canal company, upon a valuation to be fixed by the appraisers appointed by it, and to issue drainage warrants in discharge of the price, payable out of the drainage taxes. Pursuant to this authority, the city, by notarial act dated June 7, 1876, made the purchase upon a valuation of $300,000, and issued drainage warrants for that amount to Van Norden. Among those thus issued were the two sued on in this case. The city filed an exception and answer to the plaintiffs' second amended petition—First, "setting up as an exception that all powers and liabilities of the city appertaining to the drainage fund or tax had been withdrawn, and vested in a receiver appointed by decree in the suit of Peake against the city, No. 12,008 on the docket of the circuit court, and that since said decree it is without authority to stand in judgment, and that the suit should be prosecuted against the receiver"; second, "that, in case the exception should be overruled, then the city, answering, said that all drainage warrants that may have been issued by the city were issued, not as a municipal corporation, but as a statutory trustee of the drainage fund, which trust terminated when the assets and property of the drainage fund were turned over to the receiver, and the city was without authority and liability to stand in judgment. The prayer is that the plaintiffs' demand be rejected, and that, should there be judgment, it should be restricted to payment to the funds in the hands of the receiver." The defendant's exceptions were first heard by the court, and overruled upon an agreed statement of facts, admitting that a receiver was appointed June 13, 1891, by order of the circuit court in Peake against the city of New Orleans, with the powers conferred by the order, and that the city had made the transfer of the assets set out in the deed. The case was then tried before a jury practically upon the same issue set up in the exception, which had been overruled; plaintiffs offering in evidence the act of sale from Van Norden to the city of the drainage plant and franchises, and the warrants sued on which were issued in part payment of the price, and the defendant offering the bill of complaint in the case of Peake against the city, and the order appointing a receiver, and the various acts of the legislature, and the decision of the supreme court

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in the case of Peake v. U. S., 139 U. S. 349, 11 Sup. Ct. 541, also the agreed statement of facts on the trial of the exceptions. It was also mutually conceded that the city submitted to the appointment of a receiver, without opposition or argument; that no proof was introduced showing or tending to show that she had accounted to the receiver other than as shown by her deed of transfer to him, or that he had sued the city touching its trust under the drainage laws. This being the entire evidence adduced in the case, as shown by the bill of exceptions, the plaintiffs asked the court to instruct the jury to find a verdict in their favor. This the court refused to give, but, instead, directed a verdict for the defendant, for the reasons given in his written opinion on file, to which exception was duly taken.

The case comes to this court upon the following assignments of error: (1) "The judge of the said circuit court erred in not directing the jury to find a verdict in favor of the plaintiffs upon the undisputed facts set forth in the bill of exceptions filed in the record, and in directing a verdict for the defendant upon the same facts." (2) "The said judge erred in ruling that plaintiffs were not entitled to a verdict and judgment against the defendant, payable out of the drainage tax fund created by the various acts of the legislature of the state of Louisiana, as prayed in their petition." (3) "That the said judge erred in ruling that the appointment of a receiver in the case of James W. Peake against the city of New Orleans, No. 12,008 of the docket of the circuit court of the United States, operated as a bar in this suit, and directing, in consequence thereof, a verdict for defendant, and entering an absolute judgment against the plaintiffs on their demand." (4) "The warrants sued on in this case having been given by the defendant in payment of the price of property purchased by her from W. Van Norden in the act of sale of June 7, 1876, as a voluntary trustee, and not for work, while the city of New Orleans was an involuntary and noncontractual trustee, the said judge erred in not distinguishing this from the Peake Case, reported in 139 U. S. 349 [11 Sup. Ct. 541]."

Chas. F. Rice, Richard De Gray, John D. Rouse, and Wm. Grant, for plaintiff in error.

S. L. Gilmore and Branch K. Miller, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

SWAYNE, District Judge (after stating the facts). The ruling and decision of the circuit court upon which the jury was directed to find a verdict for the defendant, as appears from the opinion of the learned judge who presided at the trial, were based upon two propositions of law: First, that the city was a naked statutory trustee of the drainage fund, without any direct personal liability to the holders of warrants drawn against that fund; and, secondly, that the appointment of a receiver of that fund in the Peake Case, in 1891, operated as an abatement of this suit, which was filed in 1886, or five years before said receiver was appointed. These are the only issues before the court, and we propose to discuss them in the order stated.

The first relates to the second and third assignments of error, and involves the question whether the plaintiffs are not, as holders of warrants issued by the city in payment of the price of the dredge boats, machinery, and franchises purchased from Van Norden, entitled to a qualified judgment at law against the city, payable out of the drainage assessments and taxes. In construing the Peake Case, the presiding judge below seemed to assume that, because the supreme court in that case treated the city as a mere

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statutory, compulsory, and noncontractual trustee of the drainage taxes, it necessarily follows that she rests under no legal obligation to pay any warrants out of those taxes, even if she had collected them. We do not think the case referred to, upon careful study, can support any such construction. It indicates the right of all warrant holders to recover a judgment at law, payable out of the drainage taxes. Speaking of the judgment at law in the Peake Case, the court, on page 349, 139 U. S., and page 544, 11 Sup. Ct., by Justice Brewer, announces the following:

"That judgment determined the direct liabilities between the parties. It absolved the defendant from any primary obligation of debtor to creditor. It left it chargeable only as a trustee of a fund out of which plaintiff's claim was to be paid. It was like a judgment which in fact, against an estate, is nominally entered against the administrator thereof, to be satisfied out of the property of the estate, and not out of the individual property of the administrator. The propriety of this judgment has not been questioned. * * * It has been accepted by the complainant as a correct adjudication of the rights between the parties; and, in passing, it might be observed that its adjudication of rights was unquestionably correct."

While the supreme court thus approved the qualified judgment at law, it found, upon an accounting of the fund called for in the supplemental proceedings filed to aid its execution, that the city had discharged her liability to contribute to that fund for the purpose of paying the warrants involved in that suit, which were warrants given for drainage work done while the city was an involuntary trustee. The decision puts an end to all possible claims of holders of that class of warrants by denying their validity against the fund, for reasons stated by the court. But the plaintiffs in this case are not holders of warrants given by the city in such capacity mentioned above, but the warrants here sued on were issued by the city as a voluntary contractual trustee, for the price of the dredge boats, etc., purchased of Van Norden after her compulsory trusteeship had terminated. There would seem to be a wide distinction between the two classes of warrants, which we think is fully recognized by the supreme court in Warner v. New Orleans, 167 U. S. 467, 17 Sup. Ct. 892. In that case the issue was directly presented to this court whether the purchase warrants were governed by the decision in the Peake Case, and the court certified the following question, upon which the advice of the supreme court was requested:

(1) "Is the city of New Orleans under the warranties, express and implied, contained in the contract of the sale of June 7, 1876, by which she acquired the property and franchise from Warner Van Norden, under the averments of the bill, estopped from pleading against the complainant the issuance of the bonds to retire $1,672,105.21 of the drainage warrants, issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property, and as a discharge from her own liability to that fund as assessee of the streets and squares?" (2) "Should the decision in the case of Peake v. New Orleans, 139 U. S. 342, 11 Sup. Ct. 541, be held to apply to the facts of this case, and operate to defeat the complainant's action?"

After reciting the history of the drainage work, and the condition of the drainage fund, Mr. Justice Brewer, speaking for the court, in answer to the first question, said:

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"Now, the question is whether the city is not estopped to plead in defense of liability on these drainage warrants the fact of the prior issue of the bonds to a larger amount than that assessed against the areas of its streets and squares, and collected from private property. We think this question must be answered in the affirmative. The city, in respect to the purchase of this property from the canal company and its transferee, and in the obligation assumed by the warrants issued, acted voluntarily. It was not, in reference to these matters, as it was to those considered in Peake v. New Orleans, 139 U. S. 342, 11 Sup. Ct. 541, a compulsory trustee, but a voluntary contractor; and the proposition which we affirm is that one who purchases property, contracting to pay for it out of a particular fund, and issues warrants therefor payable out of the fund,—a fund yet partially to be created, and created by the performance by him of a statutory duty,—cannot deliberately abandon that duty, take active steps to prevent the further creation of the fund, and then, there being nothing in the fund, plead defense to a liability on the warrants drawn on that fund, that it had prior to the purchase paid off obligations theretofore created against the fund. Whatever equity may do in setting off against all warrants drawn before this purchase from the canal company and its transferee the bonds issued by the city, * * * it by no means follows that the city can draw new warrants on the fund in payment for property which it voluntarily purchases, and then abandon the work by which alone the fund could be made good, resort to means within its power to prevent any payment of assessments into that fund, and thus, after violating its contract promise not to obstruct or impede, but, on the contrary, facilitate by all lawful means, the collection of the assessments, plead its prior issue of bonds as a reason for evading any liability upon the warrants. One who purchases property, and pays for it in warrants drawn upon a particular fund, the creation of which depends largely upon its own action, is under an implied obligation to do whatever is reasonable and fair to make that fund good. He cannot certainly so act as to prevent the fund being made good, and then say to his vendor, 'You must look to the fund, and not to me.'"

This court, on return of the opinion from which the above is a selection, announced the following decision (26 C. C. A. 513, 81 Fed. 650):

"Per Curiam. The city of New Orleans, under warranties, express and implied, contained in the contract of sale of June 7, 1876, by which she acquired the property and franchise from Warner Van Norden, and under the averments of the bill, is estopped from pleading, against the complainant below and appellant here, the issuance of the bonds to retire $1,672,105.21 of drainage warrants issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property, and as a discharge from her own liability to that fund as assessee of the streets and squares. Warner v. City of New Orleans, 167 U. S. 467, 17 Sup. Ct. 892. On the case made by the bill of complaint, the decision of the supreme court in the case of Peake v. City of New Orleans, 139 U. S. 342, 11 Sup. Ct. 541, does not necessarily apply to the facts in this case, nor operate to defeat the complainant's action. It follows that the circuit court erred in sustaining the demurrer to the complainant's bill. The decree of the circuit court is reversed, and the cause is remanded, with instructions to overrule the demurrer to the complainant's bill, and thereafter proceed as equity and good conscience may require."

Another ground on which the circuit court directed a verdict for the defendant was that a receiver had been appointed in the case of J. W. Peake against the city of New Orleans, and that he alone could sue the city for an accounting of the drainage fund. An exception had previously been filed setting up this fact in abatement of the suit, and had been overruled; but, without reinstating it, the court ordered a verdict for the defendant for the same cause, and entered an absolute judgment thereon against the plaintiffs, upon the

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merits, instead of ordering the suit dismissed as in the case of abatement.

The circuit court below seems to have been of opinion that, wherever a receiver is appointed over the property of a debtor, the appointment instantly abates all personal actions pending against him, and vests all the rights of all his creditors in the receiver, who thereafter alone has authority to bring suits to enforce them, without regard to the character of those rights. A receiver is merely an officer of the court appointing him, to hold possession of property until the rights of the parties to the suit in which he is appointed can be determined. He represents neither of the parties to the suit, nor any one else, and has only such powers as the court may confer upon him. And in reference to the actions already begun, as in this case, the receiver has no status in court until he has made himself a party upon an application made by him.

In the case of Mercantile Trust Co. v. Pittsburg & W. R. Co., 29 Fed. 732, the court says:

"The appointment by this court of the receivers did not oust the jurisdiction which the court of common pleas had previously acquired of the proceedings against the railroad company, instituted by the petitioner for the ascertainment of his damages; nor did it operate as a stay thereof. Neither was the petitioner bound to bring in the receivers, as defendants, as he was seeking no relief against them. It was their business to intervene, and take defense, if they wished to do so. High, Rec. §§ 258–260; Tracy v. Bank, 37 N. Y. 523. The master was therefore correct in his determination that the petitioner's rights as a judgment creditor are not to be denied recognition, simply because he proceeded in the prosecution of this suit without making the receivers parties, or notice to them, and without leave of court."

And it is here to be observed that there was no proof in that case that the city had ever accounted for the drainage fund, or had been discharged as a trustee of that fund, or had even been asked by the receiver for an account and settlement of said fund. In fact, her relation to that fund had not terminated, and could not terminate, until she had so accounted and been discharged.

The court appointing a receiver, apparently acting upon consent, appointed J. W. Gurley receiver "of all property, interests, things in action, and effect of the drainage fund held by the defendant in trust," and vested him with all the rights and powers of a receiver in chancery, but did not vest him with authority to sue for and collect the drainage taxes,—a power which the supreme court had decided did not exist in a court of chancery.

In the case of Heine v. Commissioners, 19 Wall. 655, an effort was made to have the court assess and collect a tax to pay certain bonds, of which the court, at page 660, said:

"The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty,—state or national. In the case before us the national sovereignty has nothing to do with it. The power must be derived from the legislature of the state. So far as the present case is concerned, the state has delegated the power to the levee commissioners. If that body has ceased to exist, the remedy is in the legislature, either to assess the tax by special statute or vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any federal court. It is unreasonable to suppose that

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the legislature would ever select a federal court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the federal government of the legislative functions of the state government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee. See, also, Thompson v. Allen Co., 115 U. S. 550, 6 Sup. Ct. 140, and Meriweather v. Garrett, 102 U. S. 472."

It may happen that the plaintiffs cannot levy an execution on the property of their debtor, and take it out of the hands of the receiver, and that they will be forced to file a bill to reach property so situated; but the supposed difficulties of obtaining satisfaction are matters that in no way concern the defendant in error, and afford no legal reason why plaintiffs should not recover a judgment for their debt.

We think it therefore clear that the collection of the drainage tax after as well as before the appointment of a receiver remained solely in the city of New Orleans, notwithstanding the appointment of said receiver, and that a judgment against the city, to be paid out of the fund,—a fund which the city alone can collect,—is proper to be rendered in this suit. The judgment of the court below is therefore reversed, and the cause remanded, with instructions to award a new trial.

(87 Fed. 849.)

VALLEY RY. CO. v. KEEGAN.

(Circuit Court of Appeals, Sixth Circuit. April 5, 1898.)

No. 485.

1. MASTER AND SERVANT—RAILWAY EMPLOYE—MAINTAINING SAFE ROADBED.
   No general duty rests upon a railway company to lay planks between the rails of its tracks; but if, for any reason, it does so, the work must be done and maintained in such a way as to be reasonably safe for persons rightfully upon the tracks and in the exercise of due care.
2. SAME—EVIDENCE.
   Where a railway company has accepted its street rights on condition that it will plank between its rails those portions of the public streets used by it, and one of its employés is injured by reason of an alleged defect in the planking, it is not reversible error to admit evidence of the condition upon which the company acquired its street rights.
3. SAME—ASSUMPTION OF RISK.
   Where a railway employé, whose duties for two months have been to couple cars in a railway yard a mile long and containing 22 tracks, was injured through catching his foot in a hole between the rails, which hole had existed for two months, the court is not, under the facts of this case, justified in holding, as a matter of law, that he had assumed the risk incident to such defect.
4. SAME.
   Before a court may presume, as a matter of law, that an employé assumes the risks incident to defective machinery or roadbed, it must appear that he accepted employment with actual knowledge of such defect, or continued in service after he knew or should have known of the danger.
5. SAME—PRESUMPTION OF KNOWLEDGE.
   To justify the presumption that a railway employé knew of a dangerous defect in the roadbed, it must appear that the defect and its danger were obvious to one at all attentive.

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6. SAME—FACTS TO BE CONSIDERED BY JURY.

If defects similar to the one complained of existed at all similar places in the same railway yard, that fact should be considered by the jury as bearing upon the question whether an employé was chargeable with knowledge of such defect.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

This is an action of tort for personal injuries sustained by the defendant in error while in the employment of the plaintiff in error. At the trial it appeared that the defendant in error, William J. Keegan, was a brakeman, and as such was a member of a switching crew employed in the yard of the railway company at Cleveland, Ohio. While engaged in making a coupling, his foot was caught in a hole between the rails, and before he could extricate himself he was knocked down and run over. Keegan had been employed in the yard of the railway company in different capacities for several years before this injury. The yard of the company was very extensive, having a length of about six miles, and was occupied by several hundred tracks, including spurs, switches, and dock tracks. For some two months prior to this accident he had been a brakeman for a switching crew employed at a particular part of the general yard, called the "Island Yard," though this also was quite extensive and contained about 22 tracks, great and small. Two of the principal of these "Island Yard" tracks occupied portions of a public street called "West River Street." The injury to Keegan occurred where these tracks crossed the sidewalk of the street. At this crossing, and in the street, the tracks were planked between the rails. Just at the outer side of the sidewalk there was a space between this planking and the rail of between three and three-quarters and four inches in width at its widest part and a depth of seven inches. Keegan's business was to make all couplings which fell to his crew. He was at this time engaged in coupling a stationary car which stood just at the edge of the sidewalk to some cars which had been started by gravity towards the standing car, and were approaching at a speed of about two miles per hour. The evidence tended to show that there was a link and pin in each of these opposing drawheads. Finding the pin fast in the stationary car, he walked towards the moving car, removed the link, and set the pin, and then undertook to step out from between the cars, intending to guide the link of the stationary car from the outside. As he stepped to one side, his foot was caught in the space between the planking and rail so tightly that with his utmost exertion he could not remove it before it was run over and crushed.

At the conclusion of all the evidence the plaintiff in error requested the court to instruct the jury to find for the defendant. This was refused. It also preferred a number of other requests. Among them were two numbered 10 and 11, which were refused. These requests involve the principal question upon which the case must turn, and are as follows:

"(10) Defendant further requests the court to instruct the jury that if they shall find that the plaintiff was employed as brakeman by the defendant, and as such brakeman charged with the duty of coupling and uncoupling cars at the time he was injured; that he had been engaged in service of the defendant, the Valley Railway Company, in the yards of said company in the city of Cleveland, as brakeman or conductor, for three years prior to the accident, and in the yard where the accident happened for two months immediately preceding said accident; that during said two months the space between the planking and the rails in said yard was not blocked; that the planking of which the plaintiff complains was, during said time, in the same condition and position as at the time of the injury; that during said two months the plaintiff frequently passed over and along the place where he was injured; that the condition and position of the planking was plainly visible, and the space between it and the rail in plain sight,—he will be conclusively presumed to have had knowledge of the condition of said track and planking, and must be held to have assumed the dangers and risks incident to the use thereof.

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"(11) Defendant further requests the court to instruct the jury that the plaintiff assumed all the risks and dangers incident to the business of the defendant which were obvious and apparent, or of which he was advised, or of which in the exercise of ordinary care on his part he might have known, and if the plaintiff continued in the employment of the defendant with the knowledge or with the reasonable opportunity of knowing that the defendant had not blocked the space between the planking and the rails, and that the plank in question was from three and one-half to four inches removed from the rail next adjacent thereto, and that it was warped, rotten, or out of repair, he assumed the risks attendant upon the use of such planking and track, and cannot recover in this action."

There was a jury, who found a verdict for Keegan, and defendant has sued out this writ of error from the judgment thereon.

Kline, Carr, Tolles & Goff, for plaintiff in error.

Meyer & Mooney, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

While there is no general duty to plank between the rails, yet this railway company accepted its street rights on condition that it would plank between its rails those portions of the public streets used by it. This duty was undoubtedly imposed for the benefit of the public, who had an equal right to the use of the street. Nevertheless, if the railway company undertook to plank between the rails, it was under a duty to so put down the plank, and so maintain them when down, as that they should be reasonably safe to its employés who might be required to work thereon. This action is not for a failure to put down planking, but is for original negligence in construction or negligent maintenance when down. The company may have been under no obligation to its employés by reason of its contract with the city of Cleveland for failing to plank as required by that contract. But it was under obligation, if it did plank between its rails at street crossings, to so do the work and so maintain it when down as that it should be reasonably safe to its employés who might be required to pass over it in the discharge of their duties, provided they themselves were in the exercise of due care. It was a question for the jury, under the facts in evidence, to say whether the hole in which the foot of defendant in error was caught was a dangerous defect in the roadbed. Hannah v. Railroad Co., 154 Mass. 529, 28 N. E. 682. It was not reversible error, therefore, to admit evidence of the condition upon which the company had acquired its street rights.

Was the hole in which Keegan's foot was caught such an obviously dangerous defect in the roadbed as that, in view of Keegan's long employment in this yard, the court should have directed a verdict against him or given the special instructions asked by plaintiff in error which have been set out in the statement of the case? The learned trial judge who heard all of the evidence, and who has had much experience in such trials, was not satisfied that this question should be taken from the jury. After speaking of the duty of the railway company towards the public who might use the street occupied or crossed by the company's tracks, he instructed the jury as follows:

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"As to the employés of the defendant company, it did owe the same duty as to the public. As to the employés, even if you find the original construction was not reasonably safe, or, as maintained at the time of the accident, if you find it was not reasonably safe, yet, if you further find that the employé knew of such defective or dangerous condition, or if you find the condition was obvious and patent, and could have been seen by the employé by the exercise of ordinary care, or that the employé, by the exercise of ordinary care, should have known of it, and, notwithstanding such knowledge or opportunity for knowledge, still continued in the service of the defendant, then he assumed the risk of an accident from such defective condition, and cannot recover. It becomes, therefore, important for you to determine whether or not this was such an obvious defect as the plaintiff ought to have observed. In determining this question, you will look to how patent and open it was; how easily it could be seen; what opportunities the plaintiff had for seeing it; how long he served in the yard or in the neighborhood of the yard; under what circumstances he passed over the place; whether he passed over and around and about this crossing; when he had opportunities for observing it; or when he should have observed it, knowing how often his work would bring him there; or whether he was only about it when in the performance of his duty; and whether that duty was of such a character as to make it unlikely that he would have a chance to notice this obvious defect. All these are facts which you must consider in determining whether or not this was an obvious and patent defect, of which the plaintiff had notice, or of which he ought to have had notice by the exercise of ordinary care. And in this same connection you will remember that it is claimed that the proof shows that upon all the curves on these switches in and about this yard the defendant laid a straight-edged plank near the rail, so that, while the ends of the plank were from two to two and one-half inches from the inside of the rail, the center of the plank was three and one-half to four inches from the inside of the rail. This is an important fact for you to consider in determining whether or not the plaintiff knew or ought to have known of this obvious defect, because if all the planks were laid in that way, and that was the defendant's standard of construction, then there is all the more reason why the plaintiff ought to have had knowledge of that fact. If it was only one plank that was laid that way, he might not be expected to observe that particular place and location; but if all the planks were laid that way, and he knew it, then there was the more reason why he should have known of this particular defect, and have been on his guard. If you find from the proof that the defendant did not lay this plank in a manner to make it reasonably safe for employés, and that such defect was not an obvious one, and the plaintiff did not know of it, or by the exercise of ordinary care could not have known of it, then the defendant will be liable, and you should find a verdict for the plaintiff. But even if you find that the plank was not laid so as to be reasonably safe, but yet further find that the plaintiff knew of that fact, or by the exercise of such care as I have described ought to have known of it, and notwithstanding that defect continued in the service of the defendant, then he cannot recover. Or, if you find that the defendant did not lay this plank so as to make it reasonably safe, and yet further find that the plaintiff in coupling said car did not exercise the care that a prudent man would do under the circumstances,—that is, that he did not look where he was stepping,—and that the want of such care was the proximate cause of the injury, so that he thereby contributed to his injury, then the plaintiff cannot recover."

We have given careful attention to the facts which relate to this branch of the defense, and have reached the conclusion that there was no error in refusing to direct a verdict, and none in declining the instructions asked as to the obviousness of the defect in the roadbed which was the occasion of Keegan's hurt. The circumstances were such as to make the question one proper for the jury, and the charge on this subject was a clear and full exposition of the law, and quite as favorable as the plaintiff in error was entitled to have.

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The argument in favor of the contention that the hole in which Keegan's foot was caught was an obviously dangerous defect has chiefly been rested upon the claim that it was not an unusual or isolated space, but such an one as existed at all of the curves in the yard, and was a fault, if any, in original construction, due to the placing of straight-edged planking between curved rails, causing thereby a wider space between the plank and the rail at the center of the plank than at its ends. Of course, if such spaces existed at the center of all planks laid between curved rails in this yard, the obviousness of the existence of such spaces, and their dangerous character to employés compelled to pass frequently over them, would be much more maintainable than if this particular hole was an isolated instance. The trial judge gave attention to this fact, and instructed the jury that, if all planks at curves were laid as this one and exhibited same width of space, there would be much greater reason for charging the plaintiff, Keegan, with knowledge of the fact. There was, at least, a conflict of evidence as to the origin of the space into which Keegan fell, and as to its correspondence in character with other spaces due to planking between curved rails. There was evidence that the flange of the wheels required a space between the planks and the rail of 2½ inches, and that the spaces thus left in the yard had never been blocked. The evidence as to the width of the space in which Keegan's foot was caught was conflicting. Some witnesses, who took no measurements, estimated it at 3 inches in width at the place of the accident. Others who did measure it, in one way or another, stated it to be 3½ inches, while still others found it 3⅞ and 4 inches. There was no measurement of spaces in other localities. Several servants of the company, testifying for it, stated that they had not noticed the width of this particular space until after Keegan was hurt. The section foreman, in charge of repairs and maintenance of track and roadbed in this yard, the witness who testified that all planks at curves were laid straight-edged, and not cut to correspond with curvature of the rail, said he had not known the width of this space until he examined it after the accident. Witnesses for the defendant in error testified that this plank was warped; some said it had "humped" in the middle. One or more said it was decayed and loose, the spikes having pulled out. In this conflicting state of the evidence, it would have been error to assume that the space in question was one of original construction, or was of the same character as the spaces in all other planks between curved rails. The jury might on the evidence infer that this was a wider space than usual at other curves, and was the result of warping or decay, though the weight of evidence seems to be that the plank was sound and tightly spiked.

The evidence tended to show that this dangerous space had existed for not less than two months, and that during that time Keegan had been constantly employed in the part of the yard called the "Island Yard," and that his duties had called him to pass over or alongside of this defective roadbed many times each day for the preceding two or three months. But this "Island Yard" was about a mile in length, and contained 22 tracks, long and short, though the greater part of his work was done on this defective roadbed. Keegan's duties were to

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couple for his crew. In this work he was called from one part of this yard to another. He rode as often as he walked, and when on the ground was there for the purpose of making a coupling, a duty which required active work and great attention. He says that he had not noticed this space. No one says he had. The circumstances of his employment were such that we cannot say that he was inexcusably ignorant of the dangerous character of this space.

That unblocked spaces existed between the rails and planked portions of the track was something so long existing and so general in this yard that he may well be held to have notice of that fact. But a space of 2½ inches was not an obvious danger. It was not a danger at all. A space of 3 inches was almost equally unlikely to be a source of danger. But a space of 4 inches was a trap into which most feet might fall. Whether this space was wide enough to be obviously dangerous to persons whose occupation required them to frequently pass it would depend much more upon the closeness with which it was observed and the accuracy of the eye in estimating its width. The actual test of measurement was in more than one instance a surprise to witnesses who estimated its width by the eye. This was notably the case with John White and W. W. Plummer, witnesses for the plaintiff in error. Others, notably witnesses for the defendant in error, had from mere testimony of the eye regarded it as a dangerous space. On a matter so easily determined as the relative height of the planking and top of the rail, there was a wide difference of statement. Witnesses on both sides said the plank at the point where Keegan was hurt was from one-half to one inch higher than the top of the rail. Others for the plaintiff in error said it was about an inch below the top of the rail. As the rail was shown to be four inches in thickness, and the planking not over three inches, and both spiked to the ties, it is clear that either these witnesses were bad judges of such slight differences, or that this particular plank had "humped," and was warped, as claimed for defendant in error. The circumstances clearly make a case in which the evidence is so in conflict upon matters of fact important in determining whether the existence of a dangerous space was so obvious as to make Keegan's ignorance inexcusable as to require its submission to a jury.

The case of Gleason v. Railroad Co., 159 Mass. 68, 34 N. E. 79, has many features in common with this case, and therefore has been much relied upon by plaintiff in error. But in that case there was no conflict as to the facts from which knowledge was to be presumed. The exception assumed the existence, at the time of Gleason's employment, of a space of three and one-half inches in the planking of a track in a yard over a waterway. This space was near a switch which was tended by Gleason in a yard only 500 feet long and 40 feet wide. On these admitted facts, Gleason was presumed to have accepted the risk. The case is possibly an extreme one. To reverse in this case would require us to go even beyond that ruling. On this record we could not justifiably assume the existence of this hole when Keegan accepted employment. Knowledge of the existence of such a hole in the roadway might be presumed as matter of law from employment in a yard 500 feet long and 40 feet wide, which would be unjustifiable in a yard a

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mile long and containing 22 tracks. Neither do we think that cases are controlling which turn upon the circumstances under which an employé will be held to have accepted the risk from unblocked frogs or switches. Questions of this kind must mainly turn upon the facts of a particular record. Before a court is authorized to presume, as matter of law, that an employé accepts the dangers incident to defective machinery or roadbed, it must appear that he accepted employment with actual knowledge of such defect and its dangers, or that he continued in the service after he acquired knowledge, or by due care and reasonable attention might have known of the danger. To justify a presumption of knowledge, the defect must be obvious and its danger equally plain to one at all attentive. The facts here do not make a case where the court could justifiably say that Keegan's ignorance of the dangerous character of this space in the roadbed was unjustifiable in law and his acceptance of the risk presumed.

Other matters have been presented by the assignment of errors. They have received attention. None of them are well taken. The judgment must be affirmed.

(87 Fed. 855.)

YAZOO & M. V. R. CO. v. WAGNER.[1]

(Circuit Court of Appeals, Fifth Circuit. April 12, 1898.)

No. 601.

1. TRIAL—INSUFFICIENT PLEADINGS—CURED BY EVIDENCE.
   After the court has been called upon to hear and pass upon testimony, it will adjudicate on the facts shown, though not strictly within the pleadings, as it is well settled in Louisiana that parties are bound by the evidence introduced by them on a material point, though not strictly presented by the pleadings.
2. WITNESSES—REBUTTAL—TESTIFYING TO NEW MATTER.
   It being customary to allow considerable latitude in the manner in which witnesses shall be called for examination, a judgment will not be reversed merely because a witness, in rebuttal, after the close of defendant's case, was allowed to testify to new matters.

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

This was an action brought in the circuit court for the Eastern district of Louisiana by John Wagner, a subject of the emperor of Germany, against the Illinois Central Railroad Company, a corporation created by the state of Illinois, to recover damages for personal injuries sustained by him in being kicked off a freight train by an employé of said company on the night of the 26th of February, 1896, in the suburbs of the city of New Orleans. After answer filed by said company, defendant in error filed a supplemental petition making the Yazoo & Mississippi Valley Railroad Company, a corporation of the state of Mississippi, a party, and alleging that the Illinois Central Railroad Company is liable in solido with the Yazoo & Mississippi Valley Railroad Company, because the Yazoo & Mississippi Valley Railroad Company was owned and operated by the Illinois Central Railroad Company. The Mississippi Company appeared and filed answer, and denied generally the allegations in the petition, and alleged that the plaintiff's injuries were due to his own negligence, and

[1] Rehearing denied May 18, 1898.

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occurred by falling off defendant's train while unlawfully attempting to steal a ride thereon. No answer was filed by the Illinois Central Railroad Company to the supplemental petition. All the parties went to trial upon the issues as thus made, and there was a verdict for the defendant in error, in the sum of $1,000, against the Yazoo & Mississippi Valley Railroad Company, and a verdict in favor of the Illinois Central Railroad Company, on November 19, 1896. This verdict was, on motion, duly set aside by the court, and a new trial awarded to the Yazoo & Mississippi Valley Railroad Company, the plaintiff in error, and a final judgment entered and signed in favor of the Illinois Central Railroad Company. At a subsequent trial, verdict was rendered against the Yazoo & Mississippi Valley Railroad Company in the sum of $5,500 on February 4, 1897. Upon this verdict the court entered judgment, which was made final on March 29, 1897, whereupon the plaintiff in error filed its petition for writ of error, to operate as a supersedeas, its assignments of error, and its bond, and removed the cause into this court. Assignment of errors: First. "The circuit court erred in refusing to instruct the jury at the trial, as a matter of law, to wit: 'That the petition and supplemental petition do not state upon their face any legal cause of action, or any right to recover, as against the Yazoo & Mississippi Valley Railroad Company,—it not being alleged either in the petition or in the supplemental petition that any employé or servant of the Yazoo & Mississippi Valley Railroad Company kicked or shoved the plaintiff, or forced him to alight, from any train of said company while said train was in motion, or that his injuries were in any wise caused by any of the servants or employés of said Yazoo & Mississippi Valley Railroad Company,—and that the jury should therefore find a verdict for the defendant the Yazoo & Mississippi Valley Railroad Company.'" (Bill of exceptions No. 1.) Second. "That there is error patent on the face of the record, in that the petition and supplemental petition do not set forth any legal cause of action against the Yazoo & Mississippi Valley Railroad Company, and the face of the record does not justify any verdict or judgment as against the Yazoo & Mississippi Valley Railroad Company." Third. "The said circuit court erred in allowing the plaintiff, at the trial, to impeach the testimony of Lindsay Banks, a witness recalled by the plaintiff as a witness in rebuttal after the close of the defendant's evidence, and which witness was then and there examined before the jury as to new matters and things by plaintiff's counsel, which said new matters and things in rebuttal had not been elicited or in any wise inquired into by defendant's counsel when said Lindsay Banks was examined by defendant's counsel before the jury as defendant's witness; and the court erred then and there in allowing the witness Charles Delaney, also a witness for the plaintiff in rebuttal, to give testimony, over the objection of defendant's counsel, tending to impeach the witness Lindsay Banks as to new matters and things testified to by Lindsay Banks in rebuttal when recalled by plaintiff." (Bill of exceptions No. 3.) Fourth. "The said court erred in refusing to instruct the jury, at the close of all of the evidence, to peremptorily find a verdict for the defendant, upon the ground that the plaintiff's evidence was too slight to justify a verdict in his favor, and that, if such verdict was rendered, it would be the duty of the court to set it aside, upon the authority of Randall v. Railroad Co., 109 U. S. 482, 3 Sup. Ct. 322." (Bill of Exceptions No. 2.)

Girault Farrar, for plaintiff in error.

W. S. Parkerson and A. B. Phillips, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

SWAYNE, District Judge, after stating the facts as above, delivered the opinion of the court.

We think the question of law raised by the first and second assignments of error is well settled in Louisiana,—that parties are bound by the evidence introduced by them on a material point, although not strictly presented by the pleadings, and that, after establishing the facts at a trial, they cannot be permitted to close to their adversary

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the door which they themselves have opened; and the court, after having been made to hear and pass upon testimony introduced by the respective parties either under the allegations which are actually made, or which might have been conducive to the final determination of the object of the controversy, should adjudicate on these facts as fully as if received under specific averments. A judgment rendered under such circumstances becomes a conclusive bar to a reinvestigation of the matter. It has grown customary to allow considerable latitude at the trial, from the ordinary and strict rulings of evidence, in the manner and the time at which witnesses should be called for examination and cross-examination; and the circumstances of each case should, to a large extent, regulate the ruling of the judge in the exercise of his discretion in the matter. We sympathize very strongly with the plaintiff in error in the comments made upon the testimony in reference to the other question raised by the fourth assignment of error, but, upon inspection of the record, we believe that the court below was not only justified, but compelled, to submit the testimony to the jury, although some of it seems to us of a very doubtful character. Upon careful inspection of all the record, we do not find the errors assigned to be sustained. The judgment rendered herein is therefore affirmed.

PARDEE, Circuit Judge, dissents.

(87 Fed. 863.)

WISE v. SOUTHERN PAC. CO.

(Circuit Court of Appeals, Ninth Circuit. May 9, 1898.)

No. 408.

CUSTOMS DUTIES—CLASSIFICATION—LIQUID CREOSOTE.

The liquid creosote of commerce is not a "distilled oil," subject to duty, under Act Aug. 27, 1894, par. 60, but is a "product of coal tar" not specially provided for in said act, and entitled to free entry, under paragraph 443 thereof. 82 Fed. 311, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of California.

Samuel Knight, Asst. U. S. Atty., for appellant.
Frederick B. Lake, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The merchandise in question, consisting of 2,200 barrels of an article described in the invoices as "liquid creosote," was imported from London, England, into the United States, at the port of San Francisco, on the 19th day of March, 1895, by the Southern Pacific Company, and was thereupon entered at the custom-house for immediate consumption. Upon the return of the appraiser of the port, it was classified by the collector as "distilled oil," dutiable at the rate of 25 per cent. ad valorem, under paragraph 60 of the tariff

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act of August 27, 1894 (28 Stat. 509). The entries were liquidated in accordance with this classification, and the duty upon the merchandise, amounting to $1,472, was levied and collected by the appellant as collector. Thereupon the appellee appealed to the board of general appraisers, on the ground that the merchandise was not a distilled oil, but was entitled to free entry, under paragraph 443 of the act of August 27, 1894, as a product of coal tar, not specially provided for. The board sustained the decision of the collector, whereupon the importer applied to the court below for a review of the questions of law and fact involved in the decision of the board of general appraisers, under the customs administrative act of June 10, 1890. The court reversed the decision of the board, and held the merchandise to be a product of coal tar, not known as a distilled oil, and therefore governed exclusively by paragraph 443 of the act of 1894. 82 Fed. 311. From that decision the collector brings the present appeal.

Articles embraced by paragraph 443 of the act of August 27, 1894, are by the provisions of that act entitled to free entry. They are thus described: "Coal tar, crude, and all preparations and products of coal tar, not colors or dyes, not specially provided for in this act." The evidence clearly shows, and the court below so found, that the merchandise in question is a product of coal tar, obtained therefrom by fractional distillation. The first of the two points made by the counsel for the government is that products of coal tar are not entitled to free entry. Certainly, under the above-quoted paragraph, all products of that article that are not colors or dyes, and that are not specially provided for in the act of 1894, are entitled to such entry; for such is the clear and express language of the paragraph. It is not claimed that the article in question is a color or dye, and the only "special" provision relied upon by the appellant is paragraph 60 of the same act, which reads as follows: "Products or preparations known as alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing, and all chemical compounds and salts, not specially provided for in this act, twenty-five per centum ad valorem." The contention on the part of the government is that the merchandise in question is a product or preparation known as "distilled oil." The court below found, as matter of fact, "that said merchandise was not, nor is it, a product or preparation commonly or commercially or chemically or otherwise known as a 'distilled oil,' but was and is a product of coal tar, not a color or dye, and not otherwise specially provided for in said act." It is earnestly contended by appellant's counsel that the evidence does not justify this finding, and that, since it was all given by deposition or other writing, this court has the same advantages for correctly weighing the evidence as the trial court had. A careful consideration of the evidence, however, does not satisfy us that the court below was in error in its finding of fact. The merchandise in question, being an oil, and being derived from coal tar by the process of fractional distillation, is undoubtedly, in one sense, a distilled oil. But the weight of the evidence is to the effect that it is known as "dead oil" and "creosote oil," both commercially and chemically. The same conclusion was

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reached in the recent case of U. S. v. Warren Chemical & Manufacturing Co., 28 C. C. A. 500, 84 Fed. 638, decided by the circuit court of appeals for the Second circuit. Other reasons might be given why we think the judgment of the court below correct, but we deem it unnecessary to pursue the subject further. The judgment of the circuit court is affirmed.

(87 Fed. 885.)

ST. LOUIS CAR-COUPLER CO. v. NATIONAL MALLEABLE CASTINGS CO.

(Circuit Court of Appeals, Sixth Circuit. March 8, 1898.)

No. 527.

1. PATENTS—COMBINATIONS—IMPLICATION AS TO ELEMENTS.
   Where all the claims are for combinations only, this implies that all the rest is old, or, at least, that the patentee does not claim the elements separately.
2. SAME—SUBSEQUENT PATENT—PRESUMPTION OF PATENTABLE DIFFERENCE.
   The granting of a subsequent patent for a similar machine or device affords a presumption of a patentable difference between the two.
3. SAME—PATENTABILITY OF COMBINATION.
   To sustain a patent for a combination each element of which is old, considered separately, there must be some peculiar combination of these elements, producing new and useful results.
4. SAME—AUTOMATIC CAR COUPLERS.
   The Lorraine and Aubin reissue, No. 10,941 (original, No. 369,195), for an automatic car coupler, which is intended as an improvement on couplers of the Janney or Master Car Builders' type, is only sustainable, if at all, by confining it to the precise form shown in the specifications and delineated in the drawings, and is not infringed by a coupler made in accordance with the Tower patent, No. 541,446. 81 Fed. 706, affirmed.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

The complainant below and appellant here is engaged in the manufacture and sale of an automatic car coupler, generally known as the "St. Louis Coupler," and made under and in accordance with reissued patent No. 10,941, dated June 26, 1888. The original patent was No. 369,195, dated August 30, 1887. Both the original and reissue were to Madison J. Lorraine and Charles T. Aubin. The object of the bill was to restrain an alleged infringement of said reissued patent by the defendant company, which is engaged in the manufacture and sale of a rival car coupler, under a patent to C. A. Tower of June 18, 1895, and numbered 541,446. This patent is for an improvement on the patent issued to the same patentee, June 5, 1894, and that was an improvement on the patent issued to the same patentee, October 24, 1893, No. 507,511. Upon a final hearing, before Taft, circuit judge, the bill of complainant was dismissed, upon the ground that the Tower device did not infringe the Lorraine and Aubin patent. The opinion of the circuit court is reported in 81 Fed. 706. The defenses were noninfringement, invalidity of patent for want of novelty and patentable invention, and that the reissued patent is void for unlawful extensions of the claims of the original patent.

The character of the reissued patent to Lorraine and Aubin is thus stated in the specifications: "Our invention relates to that class of car couplings known as 'vertical plane,' and having a pivoted outwardly opening coupling head or clutch and an extended arm or buffer. The object of our invention is to provide a vertical plane coupling free from complicated parts, locking by means of a simple automatic gravity pin, requiring no adjusting and made in one piece; to provide a vertical plane coupling in which, when a coupling-

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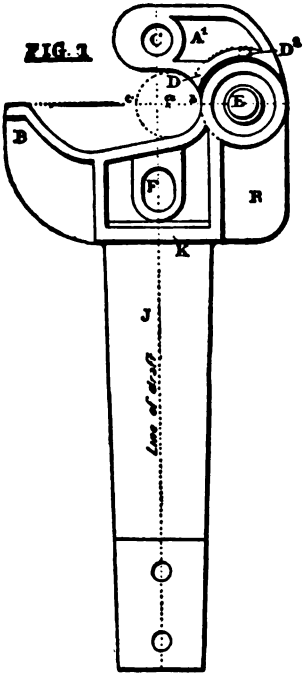
head is unlocked and released, said coupling-head, by reason of its own weight, will turn outwardly and open, and thus automatically set itself in position to effect a coupling with a similar opposing coupling-head, which may be either open or closed; to provide an improved and simplified means of setting not to couple; to so construct and arrange the coupling-head that it will be unusually strong, and to make a coupling that will perform the work under all circumstances, as well on the sharpest curves as on a tangent, and with the greatest variations in height of the opposing parts,—in fact, to provide a car coupling that will be simple in construction, automatic in action, and free from springs and superfluous and loose parts, that will combine strength and durability with simplicity and perfection of action."

For further illustration, we here set out Figs. 1, 2, 3, 5, 9, and 10, shown in the drawings of the patent. The drawings show but one form and arrangement of a vertical plane coupler, and the specifications describe only that form, and do not suggest any modification:



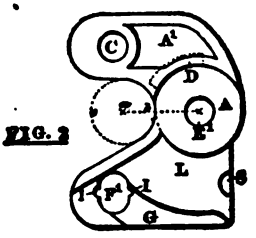


Fig. 1 is a plan of draw-head, with coupling-head—sometimes called a "knuckle"—attached and closed. Fig. 2 is a plan of coupling-head detached from draw-head.

FIG. 5

FIG. 3

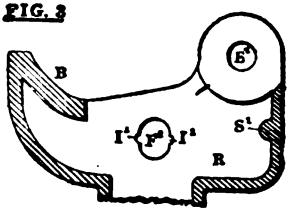


Fig. 3 is a horizontal section, showing lower half of draw-head separate from coupling knuckle. Fig 5 is a side view of locking pin.

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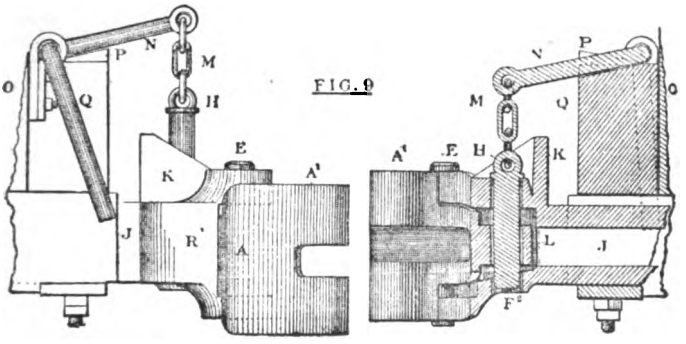

Fig. 9 is a side view of two draw-heads, with coupling-heads attached, about to make a coupling, with the left-hand coupling-head closed up and locked, and showing vertical longitudinal section of draw-head through line X^9, Y^9, of Fig. 10.

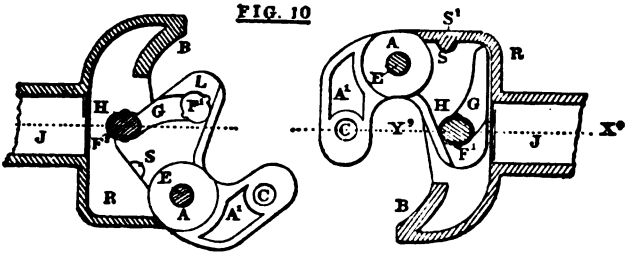

Fig. 10 is a horizontal longitudinal section of two opposing draw-heads, with coupling-heads attached, about to make a coupling, with left-hand coupling-head unlocked and open, and the right-hand coupling-head closed and locked. The same letters of reference refer to the same parts throughout.

In Fig. 10, J is the draw-bar; R is the draw-head; B is the buffer; A is the coupling-head, which is pivoted at its center to the draw-head, and which, viewed in position shown in Fig. 2 (which shows the knuckle of Fig. 10), has a general U shape; E is pin that pivots coupling-head to draw-head; A^1 is the outer arm or clutch of U-shaped coupling-head; L is rearward arm of U-shaped coupling-head; H is locking pin (said locking pin can be either oblong, round, or square); * * * F is hole in top of draw-head for reception of locking pin (this is not shown in Fig. 10, but is in Fig. 1); F^1 is hole which perforates inner arm of coupling-head for purpose of receiving locking pin, and F^2 is a hole in bottom of draw-head for same purpose; G is groove in inner arm of coupling-head for guiding locking pin as hole F^1 moves from or towards it; S is recess in arm, L, made to receive rib, S^1, which is cast to side of draw-head.

The outer or hook arm of the coupling-head is divided so as to receive a link when coupling with common draw-head. The operation of this coupler, as described in the patent, is as follows: "Should the two similarly constructed draw-heads approach each other in the position shown in Figs. 9 and 10, the arm, A^1, of the closed coupling-head, encounters the point of the arm, L, of the open coupling-head, turning it partly inward, when the point of the arm, A^1, of the open coupling-head, then encounters the concave face of the buffer-arm, B, which forces it completely around to the limit of its inward movement. As the coupling-head turns inwardly, the projecting knob or pin, D^1, being at the commencement of this movement at the top of the inclined or curved groove, D, the upper side of the groove travels up and across the pin, D^1, and by this movement raises the coupling-head up into a space left at the top to allow for this upward movement. At the same time the coupling-head is turning, and

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raising the pin, H, which rests on top of the inner arm, L, is guided in the guide groove, G, towards the hole, F, and when it is over said hole the pin, H, falls through it and into the hole, F^2, and thus securely holding and locking the coupling-head. The rib, S^1, fitting into the recess, S, is intended to give the coupling-head a solid bearing against draw-head when the coupling head is locked by the pin, H. For uncoupling, the lever arm, N, or any suitable device, is used. To uncouple, the arm, N, is raised, and this in turn, through the chain, M, raises the pin, H. The coupling-head has then nothing to retain and support it, and as the opposing head draws away from it the action of gravity draws the coupling-head down into the vacant space beneath, and as it falls, by reason of the top of the groove, D, traveling down and across the knob or pin, D^1, the coupling-head turns and opens and is set into position for another coupling. Should both heads be closed when desiring to make a coupling, the pin, H, is raised, and the automatic action of the coupling-head immediately opens and turns it ready for coupling. After the coupling-head is open the pin, H, is allowed to fall, and rests (in the position shown in Figs. 7 and 10) in the groove and on top of the arm, L, of the coupling-head. Should it be necessary to set not to couple, the lever arm, N, is raised and pushed or pulled on top of the block, P (Fig. 9), and as this keeps the pin, H, in a raised position, the coupling-head can therefore not be locked and a coupling cannot be effected. It is only necessary that one pin be operated to set to couple, to uncouple, or set not to couple."

The claims of the patent said to be infringed are the 1st, 2d, 3d, 6th, 7th, 8th, 10th, 11th, 12th, 18th, 19th, and 20th, and are as follows: "(1) The combination of the ⊃-shaped coupling-head pivoted at its center, the draw-head, and the automatic locking pin, for the purposes set forth. (2) The combination of the ⊃-shaped coupling-head, the draw-head, the pivot, E, the inclined (or curved) groove, D, and the knob or pin, D^1, for the purpose of making an automatically opening coupling-head. (3) The combination of the ⊃-shaped coupling-head, the groove, G, the draw-head, the locking pin resting on top of the arm, L, when the coupling-head is open, and falling through the holes, F^1 and F^2, when the coupling-head is closed, and the lever arm and chain, substantially as described." "(6) The combination of the ⊃-shaped coupling-head having the recess, S, the locking pin engaged with the rearward arm of said coupling-head, and the draw-head having the rib, S^1, which fits in the recess, S, only when the coupling-head is closed for making the coupling-head firm and secure when locked. (7) The combination of a coupling-head turning laterally on its pivot, and having an external arm extended to engage with and grip a like fellow and a rearward arm intended to engage with some locking mechanism, with a draw-head carrying a common gravity vertically moving locking pin, said automatically locking pin riding directly upon such rearward arm when opened, and locking such inner arm by dropping through a hole perforated in the inner arm of the coupling-head, substantially as described. (8) The combination of two similarly constructed draw-heads having ⊃-shaped pivoted automatically opening coupling-heads and the automatic locking pins, substantially as described, for the purpose of making an automatic coupling." "(10) The combination of a coupling-head, the draw-head, the groove, G, the locking pin resting on top of the arm, L, when the coupling-head is open, and falling through the holes, F^1 and F^2, when the coupling-head is closed, and the lever arm and chain, substantially as described. (11) The combination of the draw-head, the pivoted coupling-head, and the locking pin, said locking pin resting upon the inner arm of the coupling-head when the coupling-head is opened and riding upon said inner arm when the coupling-head is turned to be closed, and said inner arm being grooved to receive and guide the locking pin. (12) The combination of the draw-head, the pivoted coupling-head, and the locking pin, said locking pin working vertically in a perforation in the draw-head and resting directly upon the inner arm of the coupling-head when the coupling-head is opened, riding directly upon said inner arm when the coupling-head is turned to be closed, and dropping through said inner arm to secure said coupling-head when closed." "(18) The combination of the draw-head, the pivoted coupling-head, and the vertically moving locking pin, the inner arm of said coupling-head, when the coupling-head is closed, being held by said pin, and also interlocked with the draw-head at a point between the location of said locking pin and the coupling-

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head pivot, for the purpose described. (19) The combination of a coupling-head turning laterally upon its pivot, and having an external arm intended to engage with and grip a like fellow, and an inner arm intended to engage with some locking mechanism, with a draw-head carrying a common gravity vertically moving locking pin riding directly and solely upon such inner arm when the coupling-head is open and dropping to lock it when closed, substantially as described. (20) The combination of two similarly constructed draw-heads having pivoted automatically opening coupling-heads and the automatic gravity locking pins, substantially as described."

In the original patent the coupling-head was described as follows: "A is the coupling-head, which is pivoted at its center to the draw-head (said center being in direct line with prolongation of radius, a, b, of circle, a, b, c, and said radius being at right angle to the line of the draft), and which, viewed in position shown in Fig. 2, has a general ⊃ shape." The clause in parentheses is omitted in the reissue. The first eight claims of the reissued patent are substantially the same as those of the original patent. The remaining claims are not contained in the original patent.

The Tower device bears a very close general resemblance to that of Lorraine and Aubin. Fig. 1 of the Tower patent is this:

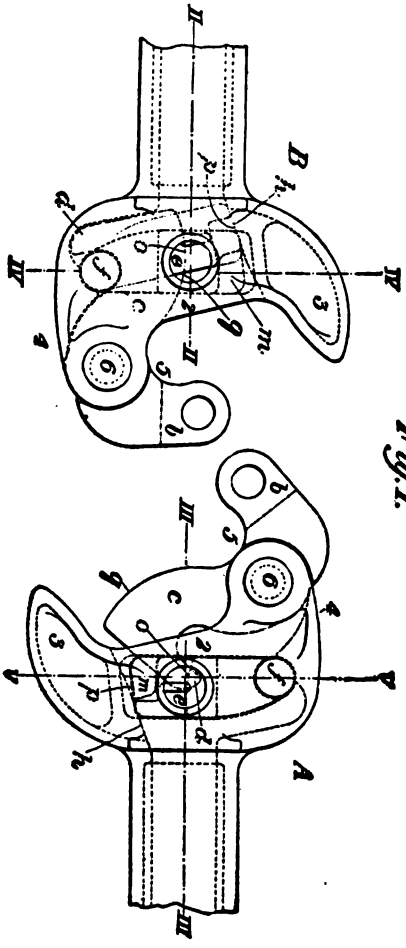

Fig. 1.

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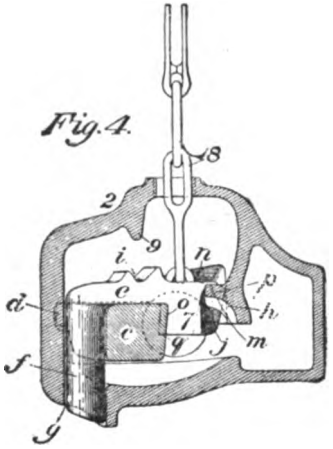
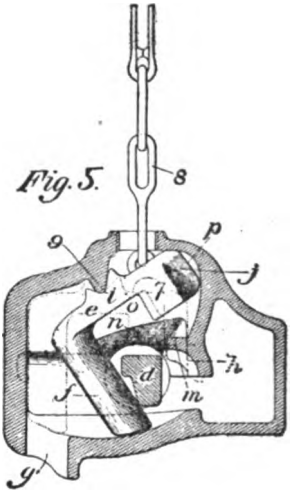
This figure is a plan view, showing two coupler-heads, one closed and the other open, about to close. Figs. 4 and 5, set out below, show the Tower locking device,—Fig. 4 when the coupling-head is closed, and Fig. 5 when open:





The draw-head is identical with that of the complainant's device. The operation of this device is thus described in the opinion of the circuit court: "In one of the prongs swings the coupling-head, and the other prong is used as a buffer bar. The knuckle or coupling-head is formed with an outer arm, b, and an inner (and preferably longer) arm, or tail, c, which project substantially at right angles to each other, and the rear side of the tail is formed into a hook, d. In order to hold the knuckle in locked position (the position shown in Fig. 4, and at B, in Fig. 1), an angled locking and opening piece is set within the coupler head, and shown most clearly in Fig. 4 and Fig. 5. The upper and transversely extending member, or arm, e, of this angled piece, reaches over the tail of the knuckle. Its dependent block or head, 7, is adapted to fit in front of and to lock the knuckle when in closed position, and its dependent arm, f, which extends downwardly at the rear of the knuckle, and is substantially upright when the knuckle is in locked position, passes through a guide hole, g, in the floor of the coupler. When the knuckle is locked, the head, 7, of the angled piece, fits between the front side of the knuckle tail and the shoulder, h, on the coupler-head; but when the brakeman raises the angled piece by a link, or lifting rod, 8, it is raised above the knuckle, and out of its path of motion. The notch, i, on the upward side of its member, e, engages a projecting rib or shoulder, 9, on the coupler-head, which shoulder acts as a fulcrum upon which the arm, f, acquires a radial motion against the rear side of the tail of the knuckle, moving it outwardly into the open space. The end of the arm, f, will then drop upon and be supported by the bottom or floor of the draw-head until the knuckle tail swung back and the operation of locking again succeeds. In this operation the rear side of the knuckle tail engages the arm, f, and moves the angled piece so as to carry the arm back into a vertical position until its lower end comes into register with the hole, g, and then the angled piece will drop by gravity, its arm, f, entering the hole, and its head, 7, adjusting itself in front of the knuckle tail, and locking the knuckle. As a security against the jumping of the

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locking piece the opposite sides of the head, 7, are not in parallel vertical planes, but with downward divergent surfaces." 81 Fed. Rep. 712.

John W. Munday, Edmund Adcock, and Henry M. Post, for appellant.

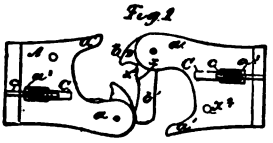
M. B. Philipp, T. W. Bakewell, and E. A. Angell, for appellee.

Before LURTON, Circuit Judge, and SEVERENS and CLARK, District Judges.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The whole subject of car couplers has long been a fruitful field of invention, and no less than 6,500 patents have been issued for improvements in this single device. The particular type of coupler to which both those in contest belong is that established by the automatic vertical plane coupler patented to Eli H. Janney, April 29, 1873, No. 138,405. This was followed by patent No. 156,024 of October 20, 1874, to the same patentee, for an improvement upon his original device, and another in 1879, and still another in 1882, and on April 2, 1878, by a reissue of his original patent, being reissue No. 8,153.

The narrowness of the field for further invention in couplers of the type now in question will not escape observation if we examine the devices covered by Janney's patents. For this purpose we reproduce Figs. 1 and 4 from the drawings of the patent to Janney of April 29, 1873:



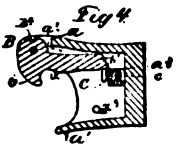


Fig. 1 represents a top plan view of two opposing couplers about to make a coupling, one open, the other closed. Fig. 4 is a transverse sectional elevation, showing the tail of the coupler-head locked within the recess of the draw-head.

It will be seen that this device presents the forked draw-head, which is one element in each of the claims of the Lorraine and Aubin patent here involved. One arm of this draw-head acts as a buffer, and also as a guard to prevent uncoupling from lateral motion of the cars; to the other a coupling-head or knuckle is pivoted which swings horizontally on the pivot in opening or closing to couple or uncouple, with a twin knuckle upon an opposing draw-head. The draw-head and coupling-head of Janney's improvement of 1879 is shown by Figs. 1 and 2, from the drawings of patent No. 212,703:

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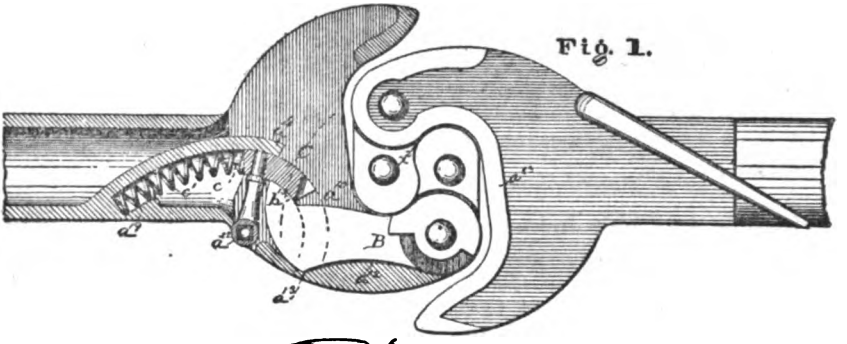
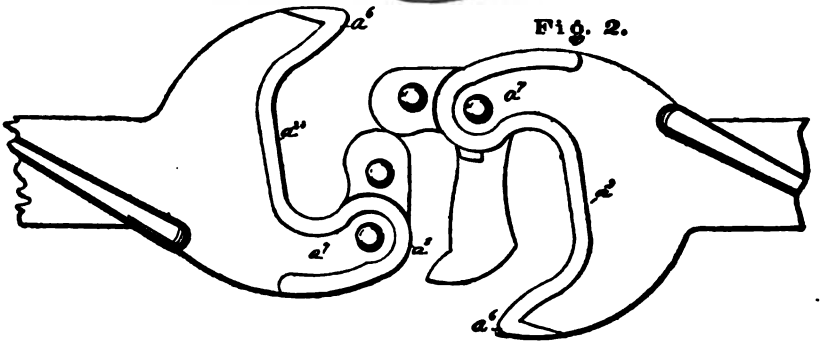
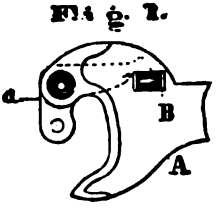
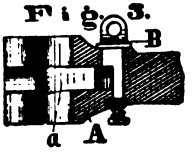
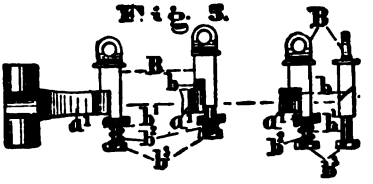




The form reached by his improvements patented February 21, 1882, No. 254,093, is shown by Figs. 1, 3, and 5 of the drawings:







This coupler is similar in construction to those of Janney's prior patents, with the exception that it has an automatic vertically moving gravity locking pin. It is guided in holes at the top and bottom walls of the draw-head, and moves freely in a vertical direction. The locking device in all the Janney patents, prior to 1882, is a spring latch engaging the tail or inner arm of the coupler-head. But this patent of February 21, 1882, is for a locking device which consists in a locking pin provided with an inclined face and a shoulder for holding the pin in a raised position. This pin extends downward through a hole in the top of the draw-head, and drops behind the inner arm of the knuckle-head when open, and in front of it when closed, the inner arm of the knuckle being also provided

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with a double inclined face so as to push the pin up until the knuckle passes under, which then drops by gravity in front of the inner arm, and thus holds it in a locked position.

In Figs. 3 and 5, shown above, this locking pin is shown with a spring, b^2, but it is intended to be used, and is used, without such spring, the specification stating, "It may be provided with a spring."

In 1887 the Master Car Builders' Association adopted a standard shape of a vertical plane coupler, which was substantially that of the Janney coupler, and fixed upon gauges to decide the limits allowed in variation of sizes. These gauges fix the dimensions of the coupler-head or knuckle, and the size and contour of space between knuckle and draw-bar. The size and shape of the tail of knuckle, method of locking, point of pivoting knuckle-head, and location of locking pin, were left to discretion of the respective manufacturers of couplers. Couplers built on these lines are known as couplers of the M. C. B. type, and to this type both the contending couplers belong. It follows, from what has already been said, that couplers of the class to which the Lorraine and Aubin device belong were old, and that the most which can be said for the patent in suit is that it is for an improvement upon other automatic gravity locking couplers, accomplishing the same general result, in much the same way.

In summing up the argument for the patent in suit, counsel for appellant in their brief say:

"Lorraine and Aubin were the first to embody in a single coupler all the advantages, without any of the disadvantages, of the couplers of the old art." "This [say appellant's counsel] they accomplish by a new combination of old parts. And they were enabled to produce this new combination by reason of having invented a single new part,—the centrally pivoted ⊃-shaped knuckle,—which was the key to the solution, and enabled the parts to go together in such manner that all of the numerous desirable results or features of advantage could be embodied without interference with each other."

Continuing, they say:

"The primary combination to which all of this is due, and which is included in all the claims of the patent, consists in the union of the following parts in a single coupler: (1) The Master Car Builders' forked draw-head; (2) The centrally pivoted ⊃-shaped knuckle; (3) The pivot pin; (4) The automatic, riding, gravity actuated locking pin."

In respect to the defendant's coupler, the same counsel, in conclusion, say that "it embodies this primary combination and in its mode of operation, and produces all of its results and embodies all of its advantages, and is therefore an infringement of the principal claims of the patent in suit."

It must be conceded that, if the patent in suit is such as to entitle it to a liberal construction and a broad application of the rule as to equivalents, the device of the defendant company is an unblushing infringement. But this was not the view entertained by the learned trial judge, who, after an elaborate review of the prior art, reached the conclusion that the patent to Lorraine and Aubin could only be sustained by confining it to the precise form shown in the specifications and delineated in the drawings of the

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patent, and that when thus limited the Tower device did not infringe.

This claim to the "centrally pivoted ⊃-shaped knuckle," as a "new part" "invented" by Lorraine and Aubin, is not the subject of any separate or distinct claim of the patent. The knuckle described is only claimed as one element in a combination, and the combination is not infringed unless all of the elements of the combination are found in the infringing device. The invention claimed by the patentees is the combination of the elements mentioned in the several claims of the patent. This implies that all the rest is old, or, at least, that the patentee does not, so far as this patent is concerned, claim the elements separately. The Corn-Planter Patent, 23 Wall. 181–224.

But it cannot be admitted that a ⊃-shaped knuckle is new. If this particular shape or form of the coupling-head be regarded as a limitation and as differentiating this element from the L-shaped knuckle of Janney, or the S-shaped knuckle of Tower or Dowling, it is not to be distinguished in form from the coupling-head of the patent to Hien of July 26, 1881, No. 244,724, nor Ferguson, No. 361,867, nor from the same element in the Kling patent of April 12, 1887, No. 361,165, which issued upon an application prior to the application of Lorraine and Aubin. For the purpose of showing this conformity in form or shape of the prior coupling knuckles of the old art, we here set out Figs. 2 and 3 of the drawings of the patent to Hien for an automatic car coupler:

FIG. 2.

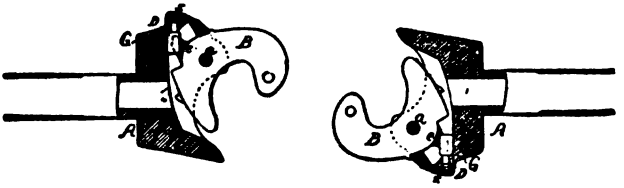
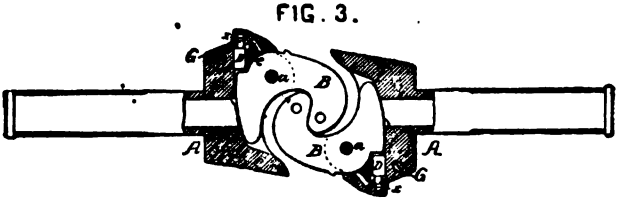


FIG. 3.



We also show below Figs. 1 and 2 from the drawings of the patent to Kling. Kling calls this knuckle a coupling-hook, and describes it as "my improved coupling-hook, I," which he says "is in general form similar to the ordinary ones in present use, and is provided with the hinge arm, i, and front vertical position or head, i, which is adapted to engage with the head of a similar hook to couple them as usual."

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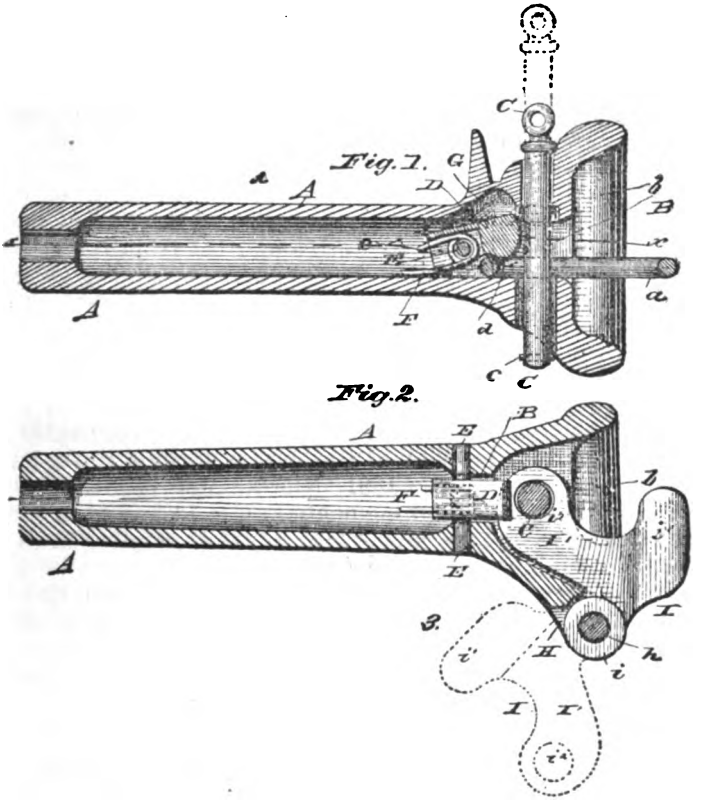
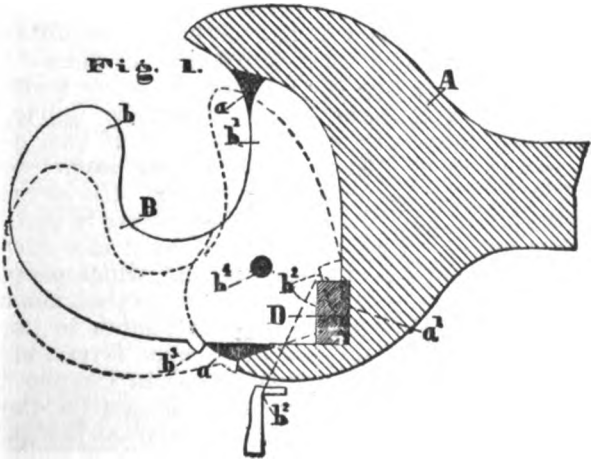


The patent to Wineman of January 29, 1884, No. 292,724, also shows this same ⊃-shaped coupling knuckle. We here set out Fig. 1 from the drawings of that patent:



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But appellant says that these knuckles from the old art, if ⊃ shaped, are not centrally pivoted, and therefore do not answer to this element in the device in suit. The expert of appellant says that by "centrally pivoted" is meant a knuckle pivoted opposite the gap between the arms of the knuckle. In the original patent of which the patent in suit was a reissue, the coupling-head was described as "pivoted at its center to the draw-head [said center being in direct line with prolongation of radius, a, b, of circle, a, b, c, and said radius being at right angles to the line of the draft]. * * *" The words in brackets are omitted from the reissue, but the drawings of the original show the point of pivoting as described in the original. This drawing has been heretofore set out. This fact will become important if it shall be found that the central pivoting of this ⊃ -shaped knuckle should be treated as a limitation of the patent in suit. But in the Kling patent, as is seen by an inspection of Fig. 2 of that patent shown above, and in Ferguson by Fig. 14, the knuckle is not only ⊃ -shaped but centrally pivoted. The most that can be said of the patent in suit is that it is an improvement upon the Janney. The Janney has the bifurcated draw-head, the rotary coupling-head, and is locked by a pin which drops by gravity. The inner arm of the coupling-head, called the "tail," when uncoupled, projects out into the cavity between the arms of the draw-head, so as to be struck by the coupling-head of an opposing coupler. Thus, the Janney, itself a combination, accomplishes the same result in substantially the same way. The unlocking devices are not here involved, and for the present we shall not refer to them.

Now, in what respect is the device in suit to be differentiated from the improved Janney coupler? The great object in securing an automatic coupler was to avoid the necessity of having the trainmen go in between the cars, and with their hands guide the link and drop the pin, a necessity which existed under the old method of coupling with link and pin, and led to great destruction of life and limb. So great has been the danger attendant upon the old link and pin methods of coupling that congress, in 1893, enacted that after January 1, 1898, it should be unlawful for common carriers engaged in interstate traffic to permit to be hauled or used on their lines any car used in interstate traffic "not equipped with couplers coupling automatically by impact, and which cannot be uncoupled without the necessity of men going between the ends of the cars." That a coupling by impact could be made automatically by the Janney device is clear. His method of uncoupling differed from that of either of the patents in suit. That operation under his patent was performed by a movement of a lever placed on the side or top of the draw-head, which necessitated some exposure between the ends of the cars by the trainmen manipulating this lever. This defect led to many attempts to improve on his mode of uncoupling by the use of springs, levers, etc., which are the subject of several patents discussed in Coupler Co. v. Pratt, 70 Fed. 622, and Gould Coupler Co. v. Trojan Car-Coupler Co., 21 C. C. A. 97, 74 Fed. 794. Though defective in this particular, the Janney devices have nevertheless come into most extensive use,

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although a large number of patents have been since granted covering mechanisms which are supposed to be improvements upon them. That Lorraine and Aubin were granted a patent for their combination affords a presumption that there is a patentable difference between their device and those of Janney or any of the many improvers who obtained patents between Janney and the application of Lorraine and Aubin. Boyd v. Tool Co., 158 U. S. 260, 15 Sup. Ct. 837. But the same presumption exists also in favor of the Tower patent.

Confining ourselves for the present to the first claim of the patent in suit, and comparing the combination there claimed of the bifurcated draw-head, the ⊃-shaped knuckle centrally pivoted, and the automatic gravity locking pin, we find in Janney, Hien, Wineman, Ferguson, Kling, Dowling, and others of the prior art the same forked draw-head combined with same form of coupling knuckle and some form of gravity locking device, performing substantially the functions of the combination of the first claim of the patent in suit. To distinguish them from the device of complainant, we must read into its claims the description of these elements found in the specifications and drawings of its patent. When we do so, we find some peculiarities in the form and shape of the knuckle, in its place of pivoting, and in the mechanism of the locking device, not precisely paralleled in any one of these devices of the prior art, though each element, considered separately, is found in some of them and is old. Lorraine and Aubin are at most but mere improvers upon Janney and upon those devices which were confessedly but improvements upon Janney. Unless, therefore, their combination, as claimed in the first claim of their patent, shall develop under examination some peculiar combination of old elements producing some new and useful result, their patent cannot be sustained at all. The knuckle of the old art assumed many shapes. In Janney it somewhat resembles an L, though the longer limb has some peculiarities of form distinguishing it from the letter it most resembles. In others of the old art this knuckle has more the shape of an S, as in Dowling, No. 379,888, and in the patent to Tower, under which the alleged infringing device is made. In still others, as in Hien, Ferguson, Kling, and Wineman, the knuckle has a general ⊃ shape.

In every one of the old devices the shape of the knuckle is made to depend upon the function it performs as a part of the locking mechanism. That the tail should be long enough to project into the cavity of the draw-head is important only if it is desirable that the tail should receive a blow from the head of the opposing knuckle to insure proper rotation and the necessary engagement of the tail and locking pin. In Janney's device this would seem to be necessary. The head of the knuckle when open is so presented to the opposing head of its twin as that closing would not always result from the impact. But in Hien, Harrington, Ferguson, Wineman, and Dowling the head of the opened knuckle is presented to the head of the opposing knuckle at such an angle as that closing is insured without regard to whether the tail is struck. In these last-mentioned devices the projecting, long, inner arm was therefore

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unnecessary, and might be omitted without interference with the other functions of the knuckle. Still another matter determining the shape and form of the knuckle is the character of the locking device. In Janney the pin is arranged to drop by gravity in front of the knuckle. When unlocked, his pin is behind the inner arm or tail of the knuckle. To raise the pin and pass the tail under it, the face of both the pin and the tail of the knuckle are so inclined as that the effect of the blow upon the front of the tail forced the pin up and the tail under it, so that by gravity the pin drops outside the tail and holds it locked. Lorraine and Aubin adopted a different mode of locking. To them it seemed desirable that the pin should ride on the tail of the knuckle until dropped by gravity into a hole in the tail and thus lock it in position. This locking device was, however, not peculiar to Lorraine and Aubin. A locking device in which a gravity pin is carried on the tail of the knuckle until dropped into a locking position is seen in the patent to Richard E. Gray, No. 261,702, and in Dowling, No. 379,888, the latter only being of the Janney type. Thus, if a gravity pin is to be carried on the tail of the knuckle, the latter must be so shaped as to furnish a surface upon which it may ride. In Dowling, the pin drops in front of the tail, as in Janney, but in Lorraine and Aubin it drops through a hole in the tail and a corresponding hole in the floor of the chamber in the draw-head. This required, therefore, greater breadth of tail than in Dowling. The head of Dowling's knuckle swings when open at such an inclination that a blow thereon from the head of the closed opposing knuckle insures rotation and secures locking. His tail need not, therefore, be long enough to project into the space between the arms of the draw-head to be struck by the head of an opposing knuckle. The head of the knuckle of the patent in suit is not so pivoted as to insure rotation under all conditions when struck by the opposing knuckle. It was therefore important to adopt the long tail of Janney. Thus the character of the locking device adopted by Lorraine and Aubin determined the shape of his knuckle and its place of pivoting. The patent itself does not specifically state any advantages in a ⊃-shaped knuckle, except as they are implied from what is said as to the advantages of a central pivoting. Of this feature of the patent the specifications say:

"The object of pivoting the coupling-head at its center is threefold: First, if the coupling-head was otherwise pivoted, by reason of its shape, when uncoupled, the arm, L, of the unlocked head would bind with arm A^1 of its neighbor, and prevent uncoupling with facility, and this it would do especially on curves; second, if the coupling-head were pivoted back of its center or in the arm, L, it would then be necessary to open both heads to either couple or uncouple, which would be unnecessary and faulty; third, if the coupling-head were pivoted in its forward arm, A^1, when the coupling-head was entirely open, the arm, L, would then come entirely without the draw-head, and there would be nothing to support the locking pin in a raised position, and it would accordingly fall, and when coupling it would be necessary to construct some mechanism to automatically raise said locking pin, which would be complicated and is unnecessary."

The supposed advantages of the ⊃-shaped knuckle centrally pivoted, as stated by M. E. Dayton, an expert for complainant, supports the conclusion we reach that both shape and point of pivoting are

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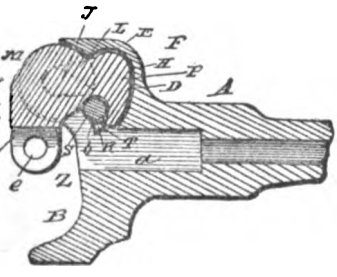
but incidents of the locking mechanism of the Lorraine and Aubin combination. Mr. Dayton, in stating the advantages of the peculiar form of the Lorraine and Aubin knuckle, said:

"As to the advantages of the ⊃-shaped coupling-hook thus mounted in the draw-head, and thus combined with a centrally placed locking pin, he must, in my opinion, be a very poor mechanic to whom these advantages are not apparent from the described and obvious operation. The primary advantage is that the rear leg of the ⊃-shaped coupling-hook swings far enough forward in opening to bring its front edge into the cavity of the draw-head and into the path of an approaching coupling-hook, while, at the same time, its rear edge remains within the chamber of the draw-head in position to act as a support for the uplifted locking pin. At the same time, also, by reason of the changed position of the pivot pin, the front arm of the coupling-hook is opened and moved laterally far enough to admit an opposing similar hook, which is closed. Still further, at the same time, the whole enlarged and changed coupling-hook is easily embraced within the limits of the inclosed coupling-head. Additionally, the added leg of the ⊃ which gives the ⊃ shape to the coupling-hook, gives a rear surface to the latter which may abut broadly against a transverse rear wall of the chamber in the draw-head to give great strength in resistance of bumping strain substantially in line with the front arm of the hook against which such strains are initially applied."

If this knuckle was not shaped as it is, and rotated from its center, it would not perform the double function of projecting out into the recess of the draw-head to be struck by the opposing coupler and at the same time support the pin when unlocked. If either of these functions be omitted, and some other locking device substituted, as in Janney, or the advantage of the projecting tail be omitted, as in Dowling, then the precise central pivoting of the knuckle is of no direct advantage. If it be pivoted far enough from the locking device to prevent adverse leverage, there is no mechanical reason for central pivoting not due to its peculiar shape and locking device. The evidence afforded by such practical men as compose the Master Car Builders' Association is of great weight; and it is in evidence that they have recommended that the point of pivoting should be 2½ inches forward of a prolonged radius at right angles to the line of draft, of a circle of which the gap in the knuckle should form a part.

The fact that the rear of the tail has a bearing against the rear wall of the chamber in the draw-head is not mentioned in the specifications, nor is any strength in resisting buffing blows claimed therein as a result of such abutment. It is doubtless of some advantage of the character indicated, but is one found to a large degree in the Dowling No. 379,888. The abutment of Dowling's S-shaped knuckle against the rear wall of the recess in which it is locked is shown by Fig. 6 from the drawings of that patent shown below:

Fig. 6.



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The specifications of that patent say: "The rear wall of this recess curves forward, and its outer or marginal portion, E, extends to the lugs, F and C, and forms a bearing and stop for the claw, N." The tail of Dowling's knuckle does not project transversely across the open recess of the draw-head as in Lorraine and Aubin, but, if it did, we should then have a ⊃ -shaped knuckle centrally pivoted, the rear wall of the chamber serving as a bearing for the tail of the knuckle. As it is, the buffing strains are in part sustained by the bearing of the short tail of an S-shaped knuckle against the rear wall of the chamber in draw-head. But this advantage of a parallel sided knuckle having a bearing against the rear wall of the chamber in the draw-head is more distinctly seen in the device patented to P. Hien, No. 244,895, Figs. 2 and 3 of which have been shown in a former part of this opinion.

We reach the conclusion from these considerations, based upon the history of the prior art, that the patent in suit can only be supported by limiting its claims to the precise form of the device described in the specifications and delineated in the drawings. That the combination has some merit may be conceded, but it is a merit dependent upon slight changes in shape and form of old elements, thereby enabling the patentees to combine in a slightly new way old elements for the purpose of doing substantially what they had been doing in the old art. These changes are of so slight a character, and the improvement by the new combination so debatable, that if any liberality in construction, or in the application of the doctrine of equivalents, be conceded for the purpose of including other improvers along the same lines within the scope of this patent, it will have the necessary effect of rendering it void for anticipation. "That which infringes if later, anticipates if earlier." The invention is in no sense one of primary character, and complainant upon this ground is not entitled to that range of equivalents accorded to such an invention.

In McCormick v. Talcott, 20 How. 402–405, the court said:

> "If he be the original inventor of the device or machine called the 'divider,' he will have a right to treat as infringers all who make dividers operating on the same principle, and performing the same functions, by analogous means or equivalent combinations, even though the infringing machine may be an improvement of the original, and patentable as such. But if the invention claimed be itself but an improvement on a known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form or combination performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable invasions of the first."

In Miller v. Manufacturing Co., 151 U. S. 207, 14 Sup. Ct. 318, Justice Jackson, for the court, said: "The range of equivalents depends upon the extent and nature of the invention." This is also the rule of the English courts in regard to mere improvements. In Proctor v. Bennis, 36 Ch. Div. 740, Lord Justice Cotton said:

> "Where there is no novelty in the result, and where the machine is not a new one, but the claim is only for improvements in a known machine for producing a known result, the patentee must be tied down strictly to the invention which he claims, and the mode which he points out of effecting the improvement."

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In Bragg v. Fitch, 121 U. S. 478–483, 7 Sup. Ct. 981, the court, speaking of an invention in the light of the prior art, said: "It is one in a series of improvements, all having the same general object and purpose; and that in construing the claims of his patent they must be restricted to the precise form and arrangement of parts described in his specifications, and to the purpose indicated therein."

In Wells v. Curtis, 31 U. S. App. 123–158, 13 C. C. A. 494, and 66 Fed. 318, this court had occasion to consider this whole question of the range of equivalents where the invention was but a mere improvement, and reached the conclusion in that case that the inventor, where the step in advance was a slight one, must be held rigidly to the specific form of the device he had described and delineated.

When we come to compare the complainant's device with that made in accordance with the Tower patent, we find that, although defendant's has the forked draw-head, it does not have either the ⊃-shaped knuckle centrally pivoted, nor the automatic gravity locking pin of Lorraine and Aubin. The Tower knuckle has the shape of an S, and is not centrally pivoted, though nearly so. The change in shape is not merely colorable, for it in shape and form is just what it must necessarily be in order to perform its function in co-operation with a locking device which does not necessarily ride on the knuckle, though it may exceptionally do so. If the tail of the knuckle was filled in to give it the ⊃ shape of complainant, a different locking device would be necessary. Shaped as it is, an absolute central pivoting is not necessary to its operation, and yet it is pivoted near enough to the center to properly rotate the knuckle and avoid adverse leverage. The locking device is a two-legged pin or block. The shorter leg drops by gravity outside the tail, and holds it in a locked position. The longer leg rides in a groove in the floor of the chamber in the draw-head. When the device is locked, this long leg drops behind the tail, and through a hole in the floor of the draw-head. When the pin is raised by the action of trainmen in lifting the chain attached, the long leg rides under the tail as a result of the radial motion given to it by the pull of the brakeman upon it, and ejects the tail from the chamber, thrusting it out into the opening between the arms of the draw-head, in position to be struck by an opposing coupler and relocked. The complainant's opening is the result of the force of gravity, which swings the tail of the knuckle down an inclined plane, where it remains open until closed again by force. This, as stated by the circuit judge, is an automatic opening, while the opening in the defendant's coupler is the result of the raising of the locking block through the interposition of a trainman. These differences between the two devices serve to distinguish the defendant's mechanism from that of the complainant's quite as markedly as complainant's device is distinguished from the old art. If there is a patentable difference between the invention of Lorraine and Aubin and the many devices prior in time to them for accomplishing the same result, there is the same patentable difference between the defendant's coupler and that of complainant. Both are mere improvers. The field was a narrow one for either. There is as much to distinguish Tower from Lorraine and Aubin as there was to dis-

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tinguish the latter from Janney, Dowling, Ferguson, Wineman, Kling, and others who have traveled over the same field. We therefore conclude, that although an S-shaped knuckle, not centrally pivoted, in combination with a gravity pin which does not normally ride on the tail of the knuckle, performs substantially the same functions as the knuckle and gravity lock of the patent in suit, yet this fact is not enough to justify us in finding infringement of a patent so limited as that of Lorraine and Aubin. Unless complainant is entitled to a considerable range of equivalents, it cannot be said that the elements in the defendant's combination are identical with those in the first claim of the patent in suit. Such a range of equivalents as would bring the defendant's device within the scope of the complainant's first claim would invalidate this claim upon the ground of anticipation. The elements included in the first claim should all be read into each of the other claims here involved. Two of the elements, the ⊃-shaped knuckle centrally pivoted and the gravity pin riding directly on the tail of the knuckle, are not found in the infringing device, limited as we have limited the first claim. The groove, G, and the recess, S, nor the shoulder, S^1, which are elements in some of the other claims, are not found in the infringing device, nor any equivalent for them, within the limited range of equivalents to which complainant is entitled.

We have not deemed it necessary to go into the question raised by the criticisms made upon the reissued patent, nor have we deemed it at all important, in the view we have as to the question of infringement, to consider the effect of the proceedings in the patent office as limiting the claims of the reissued patent. The decree of the circuit court must be affirmed upon the defense of noninfringement. We express no opinion as to the validity of the Tower patent.

(87 Fed. 258.)

FLIPPIN v. KIMBALL et al.

(Circuit Court of Appeals, Fourth Circuit. May 3, 1898.)

No. 239.

1. CHANCERY PRACTICE—SUITS AGAINST RECEIVER—JURY TRIAL.
   Where a complainant, instead of proceeding at law, under 25 Stat. 433, against a receiver appointed by a federal court, intervenes in the receivership proceeding on the chancery side, he waives his right to trial by jury; and, if the court submits an issue of fact to a jury, the verdict and findings are merely advisory.
2. MASTER AND SERVANT—FELLOW SERVANT.
   One of a gang of men engaged in clearing away a railway wreck is a fellow servant of the acting foreman of the gang, and cannot recover damages from the company for an injury received through the alleged negligence of such foreman.[1]

This case comes up on appeal from the circuit court of the United States for the Eastern district of Virginia.

[1] See note at end of case.

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Upon bill filed in the court below by the Fidelity Insurance, Trust & Safe-Deposit Company et al. against the Norfolk & Western Railroad Company, and the proceedings thereunder, the appellees, F. J. Kimball and Henry Fink, had been appointed receivers. While the company was in operation under them, the appellant, one of their employés, was injured. He intervened in the main cause by petition, setting forth the facts attending his injury, with this alternative prayer for leave to file his petition, and "to sue the receivers in the circuit court of the United States for the Eastern district of Virginia, on its common-law side, and that your honors may order and direct that the said receivers do appear and defend said suit whenever the same is instituted, or that your honors will make the petitioner a party to this cause now pending, and direct an issue out of chancery to settle the facts above recited, and will award such damages unto your petitioner as he is entitled to recover hereby," and for general relief. On motion of the petitioner leave was given to him to file the petition, which was done, and the receivers were ordered to answer the same. The answer was filed as directed, and on motion of the petitioner a jury was impaneled to try the issues raised upon petition and answer. These issues grew out of the allegations of these pleadings. The petition, after stating that the petitioner was in the employment of the receivers as a yard hand, and that his duties were confined to labor upon section 22, alleges that he was ordered by the foreman of his section to go with him to the scene of a train wreck upon section 21, for the purpose of assisting in removing a certain wrecked train of the company from the track; that he had no knowledge of this kind of work, but that he obeyed orders, and went to the wreck, and worked under the direction and control of Emmett Ferrell, sometimes called Hanna, who was not a regular manager of such work, but was that day a substitute for B. C. Hanna, the regular manager; that by reason of the inexperience of Emmett Ferrell, sometimes called Hanna, and by reason of the negligence and carelessness of the officers and agents of the receivers, and also by reason of defective appliances used in and about the wreck, the derrick which was then and there used was negligently and carelessly upset, and fell over and upon the left foot of the petitioner, crushing it, and necessitating its amputation. The answer says that Emmett Ferrell (called Hanna in the petition) was not manager of the wreck car, but acting foreman wrecker. It denies that he was either ignorant or inexperienced, and avers that he was thoroughly competent for the work. It denies that there was any carelessness or negligence on the part of any of their agents or employés, or that there were any defective appliances, or that defective appliances had anything to do with the accident, which was one of those inexplicable and unavoidable accidents that are liable to occur with the best management; and that the danger, if any, was as apparent to petitioner as any one else. A jury having been impaneled, testimony was taken before the judge who ordered the trial and a verdict was found by the jury on the issues joined for the petitioner, fixing his damages at $13,500. The respondents entered a motion to set aside the verdict on the grounds that it was contrary to the law of the case, contrary to the evidence in the case, unsustained by the evidence, and that the damages were excessive. The court below, "being of the opinion that the negligence, if any, was that of a fellow servant with petitioner, and that the damages awarded are excessive," set aside the verdict, and dismissed the petition. The case comes here on five assignments of error. The first, second, and third assign as error the setting aside of the verdict, and not entering a decree thereon for the petitioner. The fourth assigns as error the dismissal of the petition on the ground of negligence of a fellow servant, because the persons through whose negligence the accident occurred were not fellow servants of the petitioner, because the accident was caused by defective appliances, and because the person whose negligence caused the accident was known to be unfit and improper. The fifth assigns as error the holding the damages excessive.

Edmund Waddill, Jr., and Edgar Allen, for appellant.
Robert M. Hughes, for appellee.

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Before GOFF and SIMONTON, Circuit Judges, and PAUL, District Judge.

SIMONTON, Circuit Judge (after stating the facts). The appellant, Flippin, could have proceeded in an action at law against the receivers without leave of the court. 25 Stat. 433, Act 1888. Of his own accord he intervened in a suit in equity, and submitted himself to the jurisdiction of the court. By doing this he waived his right to a trial by jury, for it is a fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If it be conceded or clearly shown that a case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or perplexity. Barton v. Barbour, 104 U. S. 133. This case being one of equitable jurisdiction only, the court was not bound to submit any issue of fact to a jury, and, having done so, was at liberty to disregard the verdict and findings of the jury, either by setting them, or any of them, aside, or by letting them stand, and allowing them more or less weight in its final hearing and decree according to its own view of the evidence in the cause. Improvement Co. v. Bradbury, 132 U. S. 509, 10 Sup. Ct. 177. So, when the court below, in accordance with the prayer of the petition, ordered an issue out of chancery to try the issues, the verdict was only advisory, and not conclusive upon the court. It had the right to disregard it, and even to render a decree contrary to it. Watt v. Starke, 101 U. S. 247. These authorities dispose of the assignments of error which look to the result of the verdict of the jury. It was for the court below alone to determine its force and effect, and this court cannot deny its right to disregard it.

Having set aside the verdict, the circuit court proceeded to consider the case, and dismissed the petition. This was in accordance with rules of equity procedure. A similar course was sustained by the supreme court in Kohn v. McNulta, 147 U. S. 238, 13 Sup. Ct. 298. It is alleged as error that the court dismissed the petition upon the ground that the negligence, if any, causing the accident, was that of a fellow servant of the petitioner. The assignments of error proceed upon the grounds that the foreman in charge of the wreck was wholly incompetent for the performance of his duty; that the appliances used were defective, and that superior officers of the receiver were present directing, in whole or in part, the operations; and that the foreman in charge of the wreck was entirely inefficient; and that in no event was he the fellow servant of petitioner. As this is an appeal in equity, we must examine the testimony, which is spread out in full on the record. The petitioner, at the time of the accident, was 24 years of age. He had been in the employment of the receivers one month as a section hand, and had seen service before on railroads for two months and a half. The wreck occurred about two miles from Crewe, where he was employed, and he was ordered by his section master to go with other hands to the wreck to assist in clearing the track. The gang engaged in this work was

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made up of hands from several parts of the road, who were under the direction of Emmett Hanna or Ferrell. This man was the adopted son of Capt. B. C. Hanna, who was wrecking master, and was his chief assistant, acting for him in his absence. On this day the elder Hanna was engaged on another part of the road. The evidence shows that Emmett Ferrell had the perfect confidence of his chief; that, notwithstanding his youth (he was either 22 or 23), he had had large experience; and he enjoyed among the railroad people the reputation of a skillful and efficient man in charge of wrecks. It also appears from the evidence that on the day of the accident he was in full charge, and although there were present Sowers, the track supervisor, Wells, the road foreman of engines, Sanderson, assistant superintendent of the motive power, and perhaps other officials, none of them assumed charge of the wreck, as it was not in the line of their duties, but left everything to Ferrell. Nor does the preponderance of the evidence lead to the conclusion that the appliances used were defective. It is true that in the beginning a rope used at the derrick broke, but nothing occurred as the result of it, and, the rope having been mended, or another substituted, no further break occurred. The accident probably occurred because, the cars not having been fastened to the track, there was too much weight upon the derrick, and a lateral strain. These caused it to upset, and so the petitioner was hurt. If there was negligence in this, it was the negligence of Emmett Ferrell, who was at the time directing the operations, and himself assisting in arranging the blocks to the wheels of a car. These blocks were not regularly prepared, but were made of fence rails, parts of cross-ties, and wood picked up on the track. Evidence was offered showing that on one system of railways wrecking cars always carried blocks prepared for and suitable to this purpose. But there is no evidence of a custom or usage of this character; nor is there evidence that ordinary blocks, obtained as those were on this occasion, do not serve their purpose. It must be remembered that there is no presumption of negligence in this case against the defendant, the action being by an employé against an employer. The burden is on the petitioner. Railroad Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707. So the case really turns upon the point, which controlled the circuit court, if the accident was the result of negligence, the negligence was that of Emmett Ferrell; and the question is, was he the fellow servant of the petitioner? He was the foreman or acting foreman of a wreck car at the wreck. His position is thus explained by Mr. Sanderson, who seems to be an intelligent witness:

"He is a boss or acting foreman at that time in charge of a gang or collection of men who may have been gathered up as has been most convenient; exactly the same relative position as a section foreman or car foreman would be with a gang working under him."

In determining this question it is unnecessary to quote the multitude of decisions bearing upon it, often contradictory, and frequently obscure. The general rule is well stated in a note to Railroad Co. v. Smith, 8 C. C. A. 670 (s. c. 59 Fed. 993), quoting for its support many authorities:

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"It makes no difference in the application of the rule exempting the master from liability for injuries to his servants for the acts of the co-servants that the one receiving the injury is inferior in grade and subject to the orders of the one by whose negligence the injury is caused, if both are engaged in the same general business, accomplishing one and the same general purpose."

We held in Thom v. Pittard, 8 U. S. App. 597, 10 C. C. A. 352, and 62 Fed. 232, that section men and laborers on repair trains, being engaged in the common purpose of keeping the railroad in order, are fellow servants. In Deavers v. Spencer, 25 U. S. App. 411, 17 C. C. A. 215, and 70 Fed. 480, this court held that a track hand, who was injured by the alleged negligence of the track foreman while he was working on a railroad, was the fellow servant of the foreman, and could not recover against the receivers for the injuries he had suffered. In the circuit court of appeals of the Fifth circuit—McGrath v. Railway Co., 23 U. S. App. 86, 9 C. C. A. 133, and 60 Fed. 555—it was held that "a railroad employé, who was one of a gang of men employed to remove a wreck, cannot recover from the company for injuries caused by the negligence of the wreck master, who has charge of the wrecking car." And in Railway Co. v. Rogers, 13 U. S. App. 547, 6 C. C. A. 403, and 57 Fed. 378, the same court held that the acting foreman of a gang of laborers engaged in repairing a bridge was the fellow servant, engaged in the same employment, with a member of the gang who was injured by the falling of a piece of timber during the repairs of the bridge. Besides this, the petitioner is a man matured. He was in the employment of the receivers as a section hand to work on the track. He was not placed in a position of undisclosed danger; but he was doing work whose risks were obvious. Necessarily he assumed those risks when he went on with his work, and the mere happening of the accident cannot impute negligence to his employer. Kohn v. McNulta, 147 U. S. 238, 13 Sup. Ct. 298. The judgment of the circuit court is affirmed.

NOTE.

Who Are Fellow Servants.[1]

1. In General.

[a] (Ala. Sup. 1896) The relation of master and servant does not exist between a convict and one who has contracted with the state for convict labor, the convict being a mere prisoner in custody of the contractor as his keeper. Hence a convict is not a fellow servant of employés of the contractor with whom he works in a common employment, nor of fellow convicts engaged in the same work.—Buckalew v. Railroad Co., 20 South. 606, 112 Ala. 146.

[b] (Ind. Sup. 1897) Rev. St. 1894, § 7083, subd. 4, providing that the rule of fellow servants shall not apply "where such injury was caused by the negligence of any person, in the service of such corporation, who has charge of any signal, telegraph office, switch yard, shop, round-house, locomotive engine, or train upon a railway," does not enlarge the class of vice principals so as to include brakemen. The words "switch yard" were not intended to be separated by a comma, so as to make servants having temporary charge of a switch vice principals.—Railway Co. v. Little, 48 N. E. 862.

[c] (Ind. App. 1897) An employé authorized to perform duties which are

[1] This note is supplementary to notes by the same title to Railroad Co. v. Smith, 8 C. C. A. 638, and to Railway Co. v. Johnston, 9 C. C. A. 596.

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clearly the master's duties is to that extent a vice principal.—Peirce v. Oliver, 47 N. E. 485, 18 Ind. App. 87.

[d] (Ind. App. 1898) If the injury was caused by another servant while performing a duty which he owed to the master, he is a fellow servant.—Telegraph Co. v. Bower, 49 N. E. 182.

[e] (Minn. Sup. 1896) Plaintiff, with others, was employed as a sectionman in repairing defendant's main track, by taking up rails, putting in new ties, and then replacing the rails. The work had to be done with great and extraordinary haste, in order to avoid danger to trains that were, or might be, approaching. While engaged in performing this work with this degree of haste, and while he and another sectionman were carrying a heavy iron rail, plaintiff was injured by his fellow servant's negligently releasing his hold on the rail and letting it fall. *Held*, that plaintiff's employment involved an element of hazard or danger which contributed to the injury, and which was peculiar to the "railroad business," and that, therefore, Gen. St. 1894, § 2701, making railway companies liable to their servants for the negligence of their fellow servants, applied.—Blomquist v. Railway Co., 67 N. W. 804, 65 Minn. 69.

[f] (Neb. Sup. 1898) A shipper of live stock by accepting a pass permitting him to accompany the stock and attend it in transit does not become the servant of the carrier, and is therefore not within the fellow-servant rule.—Railroad Co. v. Crow, 74 N. W. 1066.

[g] (Utah Sup. 1897) When the master furnishes a safe place and safe appliances, considering the work to be performed, and the servant, by his negligence, renders the place unsafe, without the master's fault or knowledge, the servant does not, in such a case, become the vice principal, and his knowledge is not the knowledge of the principal so as to render him liable.—Anderson v. Mining Co., 50 Pac. 815.

2. Servants Charged with the Duty of Furnishing Safe Appliances or Remedying Defects—In General.

[a] (N. Y. Sup. 1897) A subordinate employé does not, by being placed in charge of a particular appliance used about his work, become the representative of the master, charged with the duty of seeing that reasonably safe and proper appliances are furnished, so as to render the master liable for injury to a co-employé, caused by his negligence in respect to the appliance in his charge.—Crowell v. Thomas, 46 N. Y. Supp. 137, 18 App. Div. 520.

[b] (Wash. Sup. 1897) Where a master commits to another the duty of providing safe appliances, such person becomes a vice principal, whose failure is that of the master.—Ogle v. Jones, 47 Pac. 747, 16 Wash. 319.

[c] (Wis. Sup. 1896) Where the duty of a master to furnish a reasonably safe place for an employé to work is delegated to another employé, such employé is not, as regards the performance of such duty, a fellow servant of the other, and his negligence is that of the master.—Eingartner v. Steel Co., 68 N. W. 664, 94 Wis. 70, and 34 Lawy. Rep. Ann. 503.

3. —— Appliances.

[a] (U. S. C. C. A. 9th Circuit, 1898) Deceased was employed as a dumper engaged in unloading coal, hoisted from a vessel in large buckets, to which were attached pieces of rope called "tails," which, in the operation of dumping, the dumpers took hold of, to steady and pull the buckets towards them. These tails were made, spliced, and put on the buckets by the dumpers, the rope being furnished by the employer. The giving way of one of these tails, from not being properly spliced, resulted in the fall of deceased through a hatchway, and his consequent death. *Held*, that the negligence was that of fellow servants, for which the employer was not responsible.—Ryan v. Smith, 29 C. C. A. 427, 85 Fed. 758.

[b] (Colo. Sup. 1895) A person employed by a mine owner to timber a drift so as to provide a safe place for the miners who were running the drift to work in is not a fellow servant of the miners.—Grant v. Varney, 40 Pac. 771, 21 Colo. 329.

[c] (Colo. Sup. 1896) That a rule of the company makes it the conductor's duty to see to the proper adjustment of switches does not make him a vice

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principal of the company as to a train hand injured by a switch being left open.—Railroad Co. v. Sipes, 47 Pac. 287, 23 Colo. 226.

[d] (Colo. App. 1895) When it appears that the decedent was killed by the negligence of the mine boss appointed under the coal-mining act of 1885, which compels his appointment, makes it his duty to attend to the mine and make it safe to work in, and subjects him to punishment in case of failure, and it does not appear that he had any authority over the workmen, other than that prescribed by statute, he and decedent are fellow servants, and the company is not liable for his negligence.—Iron Co. v. Lamb, 40 Pac. 251, 6 Colo. App. 255.

[e] (Ill. Sup. 1897) The timber man employed in a coal mine to prop the roof is not, as a matter of law, a fellow servant of one employed as a driver in hauling coal in the mine. Whether they are fellow servants is a question of fact for the jury.—Coal Co. v. Scheiber, 47 N. E. 1052, 167 Ill. 539.

[f] (Ill. Sup. 1898) Servants while engaged in building a lumber pile, and allowing certain boards to project on which scaffolds might be constructed, are not fellow servants of one who had no hand in such work, but who was injured by the breaking of such boards while afterwards attempting to build a scaffold thereon. Judgment (1897) 68 Ill. App. 523, affirmed.—Lumber Co. v. Ligas, 50 N. E. 225, 172 Ill. 315.

[g] (Ill. App. 1896) The carpenters who build a scaffold, and the bricklayers who work upon it, are not to be regarded as fellow servants, in considering the question of the proper construction of the scaffold, when such carpenters are under a different foreman, and the work is entirely disassociated.—Wood v. Gumm, 67 Ill. App. 518.

[h] (Iowa Sup. 1897) A miner and one charged with the duty of keeping the mine safe are not fellow servants.—Blazenic v. Coal Co., 72 N. W. 292, 102 Iowa, 706.

[i] (La. Sup. 1894) Where the engineer in charge of defendant's boilers and machinery was informed of the dangerous condition of a boiler, but he took no steps to discontinue its use or remedy the defect, and it exploded three hours afterwards, *held*, that defendant is liable for the death of an employé who was killed thereby.—Mattise v. Manufacturing Co., 16 South. 400, 46 La. Ann. 1535.

[j] (Mich. Sup. 1894) Plaintiff was employed by defendant, a builder of steel vessels, to go over the work and supply omitted rivets after the riveters of the plates of a vessel were through, and was injured by the breaking of a scaffold. He and the carpenters who built the scaffold were continuously employed by defendant, and, through their respective foremen, were under the supervision of one superintendent, together with artisans of the various other trades among which the work was apportioned. *Held*, that defendant was not liable for plaintiff's injury, it being occasioned by the negligence of a fellow servant.—Beesley v. F. W. Wheeler & Co., 61 N. W. 658, 103 Mich. 196.

[k] (Mich. Sup. 1897) A master had in a storehouse at C. suitable appliances for bridge building, and directed a foreman to select from them a rope to be used by the laborers under him at M., 80 miles away. The rope proved defective, and a laborer was injured. *Held*, that in the selection the foreman represented the master.—Thomas v. Railroad Co., 72 N. W. 40.

[l] (Miss. Sup. 1894) Failure to have sand in the dome of a locomotive is not failure to provide a safe appliance, but, as regards a brakeman injured thereby while coupling cars, the negligence of the engineer or fireman whose duty it is to fill it, and these are his fellow servants in the same department of labor.—Railroad Co. v. Jones, 16 South. 300.

[m] (Mo. Sup. 1894) Where a railroad company knew that a car was defective, and so marked it, and ordered it to be taken out of a train and put on the repair track, but its servants, in violation of such order, placed it in a train, without any danger mark on it, their negligence is that of the company, in respect to its duty to furnish safe appliances, and not the negligence of fellow servants of another employé, who is injured by such defects.—Rodney v. Railway Co., 28 S. W. 887, 127 Mo. 676.

[n] (N. Y. Sup. 1896) A new wick in the headlight of a locomotive, to replace an old one, is a supply, and not a repair; and where a rule of the

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railroad company requires the engineer to see that the headlight is in order, and he fails to do so, in consequence of which a fireman on another train is injured, the injury is the result of the negligence of a fellow servant.—Simpson v. Railroad Co., 39 N. Y. Supp. 464, 5 App. Div. 614.

[o] (N. Y. Sup. 1897) A servant of plaintiff, who, as an incident to his work, was obliged to construct a scaffold, was unable to find suitable materials about the premises, and he so informed the foreman, to whom he had been directed to report when employed. The foreman told him to use an appliance that had been used in another kind of work. This appliance was not suitable for plaintiff's work, and the foreman undertook to adapt it thereto, after which he told plaintiff that it was a good scaffold, and to go on with his work. *Held*, that the foreman was not a fellow servant with plaintiff as to the construction of such scaffold, but was a vice principal.—Richards v. Hayes, 45 N. Y. Supp. 234, 17 App. Div. 422.

[p] (N. Y. Com. Pl. 1895) While plaintiff was employed by defendant in carrying goods over a gang plank which was secured at each end by ropes, one of the ropes broke, causing the injury complained of. It was the duty of defendant's foreman to see that the plank was properly secured, and defendant kept a supply of rope on hand for the use of the foreman and his men. *Held*, that the neglect of the foreman in not properly securing the plank was the neglect of a fellow servant.—Conway v. Railroad Co., 34 N. Y. Supp. 113, 13 Misc. Rep. 53.

[q] (N. Y. City Ct. Brook. 1894) Where a workman is injured by the fall of a derrick, occasioned by the neglect of another employé in charge of the derrick to provide a check rope, the master is not liable.—Jenkinson v. Carlin, 30 N. Y. Supp. 530, 10 Misc. Rep. 22.

[r] (Ohio Sup. 1894) A "filler" in a coal mine, whose duty it is to post and prop the roof of the mine, is a fellow servant of the miner.—Mining Co. v. Clay's Adm'r, 38 N. E. 610, 51 Ohio St. 542.

[s] (Wis. Sup. 1894) Persons employed to build scaffolds around a boat for the use of riveters working thereon are not fellow servants of the riveters.—Cadden v. Steel-Barge Co., 60 N. W. 800, 88 Wis. 409.

4. —— Repairs.

[a] (Ark. Sup. 1895) One employed by a railroad company as foreman over a crew whose duty it is to repair bridges and trestles, and who, for such purpose, is supplied by the company with cars in which he boards the crew, the company moving the cars as required, is a fellow servant of the engineer of a train which collides with one to which his cars are attached, and he cannot recover for personal injuries received.—Railway Co. v. Henson, 32 S. W. 1079, 61 Ark. 302.

[b] (Ill. Sup. 1895) The question whether a railroad section hand and a force of men employed in building and repairing the railroad fences under a different foreman were fellow servants is one of fact.—Railroad Co. v. O'Brien, 40 N. E. 1023, 155 Ill. 630.

[c] (Ind. Sup. 1894) The foreman of a railroad company's machine shop, who neglects to repair a defect in an engine of which he has notice, is not, as respects the duty to repair such defect, the fellow servant of a brakeman who is injured because of such defect.—Railway Co. v. Stein, 39 N. E. 246, 140 Ind. 61.

[d] (Iowa Sup. 1894) A workman, employed by a vice principal to put a place of work in proper repair, does not become himself a vice principal, but is a fellow servant with one working in the place being repaired, and who has been employed by the same authority as himself.—Fosburg v. Fuel Co., 61 N. W. 400, 93 Iowa, 54.

[e] (Minn. Sup. 1896) A track repairer employed by an electric street-railway company is a fellow servant of a motorman employed by the company, and hence cannot recover for injuries resulting from the failure of the latter to give timely warning of the approach of a car, as required by the rules.—Lundquist v. Railway Co., 67 N. W. 1006, 65 Minn. 387.

[f] (Tex. Civ. App. 1895) A car repairer, working in a separate yard from a "hostler," is not a fellow servant of such hostler, nor of the switchmen in such other yard, particularly while on a car under orders to proceed to

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another place and assist in repairing damages caused by a wreck.—Railway Co. v. Keller, 32 S. W. 847, 11 Tex. Civ. App. 569.

[g] (Tex. Civ. App. 1897) Evidence that the engineer to whom a trainman reported the loss of the engine step, and who promised to replace the same, was charged with the duty of reporting to defendant company any defects in the engine, warranted a finding that said engineer was the vice principal of defendant so far as to bind the latter by the promise.—Railway Co. v. Bingle, 41 S. W. 90.

[h] (Wis. Sup. 1895) A car repairer and a switchman are fellow servants. —Smith v. Railway Co., 65 N. W. 183, 91 Wis. 503.

5. Servants Charged with the Duty of Inspection.

[a] (U. S. C. C. A. 7th Circuit) A car inspector is not the fellow servant of a brakeman.—(1894) Railroad Co. v. Myers, 11 C. C. A. 439, 63 Fed. 793; (1895) Railroad Co. v. Mansberger, 12 C. C. A. 574, 65 Fed. 196.

[b] (U. S. C. C. A. 7th Circuit, 1895) A locomotive engineer, charged with the duty of inspecting his engine, is not, in respect to such duty, a fellow servant of a hostler's helper engaged in switching engines in the railroad yard.—Railroad Co. v. Mulligan, 14 C. C. A. 547, 67 Fed. 569.

[c] (U. S. C. C. A. 5th Circuit, 1895) A person employed by a railroad company to inspect its locomotive boilers, and cause repairs to be made when necessary, is not a fellow servant of other employés about the yards of the company.—Railway Co. v. Thompson, 17 C. C. A. 524, 70 Fed. 944, and 71 Fed. 531; Same v. Dietz, Id.

[d] (U. S. C. C. A. 8th Circuit, 1896) When a miner is charged with the duty of going through the mine from time to time and inspecting it, and seeing whether it is free from gas, he is discharging a personal duty of the master, and while thus engaged is not a fellow servant of the other miners.—Gowen v. Bush, 22 C. C. A. 196, 76 Fed. 349.

[e] (Ill. App. 1894) Whether an employé of a railroad company engaged in coupling cars in its yard is a co-servant of its yard masters and inspectors is a question of fact.—Kimel v. Railroad Co., 55 Ill. App. 244.

[f] (Ind. Sup. 1894) One employed by defendant to inspect cars furnished by a railway company, and to shift them to a point where they could be loaded, is a fellow servant of one employed to load them, and defendant is not liable for injuries to the latter, caused by defects in the cars which the former negligently failed to discover and guard against.—Neutz v. Coke Co., 38 N. E. 324, 139 Ind. 411.

[g] (Ky. App. 1896) A conductor of a freight train, and a person employed at a railroad station to inspect cars and ascertain if they are in a safe condition, are not fellow servants.—Railroad Co. v. Hilliard, 37 S. W. 75.

[h] (Mass. Sup. 1894) In an action by a brakeman for personal injuries, under a count alleging that defendant failed to have sufficient competent inspectors of cars received by it from other roads, by reason of which he was injured, he cannot recover on account of the neglect of an inspector, he being a fellow servant.—Bowers v. Railroad Co., 38 N. E. 508, 162 Mass. 312.

[i] (Neb. Sup. 1898) A station agent, whose duty it is to set brakes on cars left at his station, but who is not charged with the duty of inspecting or repairing the brakes, is not a fellow servant of a car inspector.—Railroad Co. v. Kellogg, 74 N. W. 454.

[j] (N. Y. Sup. 1896) Where a master furnishes a sufficient quantity of timber for beams to be used in a structure in course of erection, and provides for their inspection, in order that defective beams may be rejected, the inspection is merely a detail of the work, and the inspector is a fellow servant of those at work on the structure.—Stourbridge v. Railroad Co., 41 N. Y. Supp. 128, 9 App. Div. 129.

[k] (N. Y. Sup. 1896) One intrusted with inspection of a boiler is a representative of the master.—Egan v. Railroad Co., 42 N. Y. Supp. 188, 12 App. Div. 556.

[l] (N. Y. Com. Pl. 1895) A yard brakeman and another employé in the same yard, who is charged with the inspection and repair of cars, are not fellow servants.—Jennings v. Railroad Co., 33 N. Y. Supp. 585, 12 Misc. Rep. 408.

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[m] (Ohio C. C. 1894) A railroad brakeman and one whose duty it is to inspect all cars coming into the yards where such brakeman is at work, are fellow servants within the rule exempting the master from liability for their injuries.—Railway Co. v. Lamphere, 9 Ohio Cir. Ct. R. 263.

6. Servants Charged with the Duty of Instructing or Warning Others.

[a] (U. S. D. C. Cal. 1896) The mate of a vessel engaged between decks with a gang of men in loading lumber sent down from a wharf through a chute, and a workman on the wharf, under charge of a foreman, whose duty it was to give warning of the sending of pieces of lumber, were fellow servants.—Hermann v. Mill Co., 71 Fed. 853.

[b] (Ala. Sup. 1897) Where the only difference in C.'s and plaintiff's employment was that C. was authorized to instruct plaintiff to do certain work, while plaintiff was employed in building a telegraph line, under proper directions, this did not constitute C. a vice principal.—Cable Co. v. Hulsey, 22 South. 854, 115 Ala. 193.

[c] (N. M. Sup. 1897) A coal-mining company's employé, whose duty it is to make rounds of inspection, and advise the miners, as they go to work, of the condition of their places as to the presence of dangerous gases, represents the company in the discharge of that duty.—Railroad Co. v. Deserant, 49 Pac. 807.

[d] (N. Y. Sup. 1897) A foreman, while engaged in repairing or altering a machine by wiring in a movable table, and giving suitable instructions to an unskilled employé in respect to its use, in performance of the duty of the master as his alter ego, is not a fellow servant.—Strauss v. Manufacturing Co., 48 N. Y. Supp. 425, 23 App. Div. 1.

[e] (N. Y. Sup. 1898) In respect to the duty of instructing a servant about machinery at which she is placed at work by a foreman, he is the alter ego of the master, and not a fellow servant of plaintiff.—O'Connor v. Barker, 49 N. Y. Supp. 211, 25 App. Div. 121.

[f] (N. Y. Sup. 1898) Deceased was employed inside a caisson fitted over the pillars of a bridge, which were filled with masonry, and were being blasted as the caisson sank. He had been employed for two days, during which blasting was carried on continuously. When a blast was about to be fired, notice was given the men. At the time deceased was killed, the man firing the blast did not give sufficient notice to enable deceased to reach a place of safety. *Held*, that his death was caused by the negligence of a fellow servant, for which defendant was not responsible.—Gallagher v. McMullen, 49 N. Y. Supp. 734, 25 App. Div. 571.

[g] (Utah Sup. 1897) Plaintiff was a pusher in defendant's mine, which employed three shifts of men, and from each shift a pusher was selected to direct the work, receiving 50 cents per day more than his fellow workmen. Blasting was done in the bottom of the shaft, and the reports counted after each blast to see if there were any missed holes. The pushers reported to their successors the number of missed holes, but, if the outgoing pusher failed to report, the oncoming pusher made inquiry, and this was a rule adopted by the pushers for their security. Over the shifts was a foreman of the mine, who was never notified about missed holes. The shift preceding plaintiff's went off work leaving some of the holes unexploded, the explosion of which caused the injury to plaintiff. *Held*, that as to each other the pushers were fellow servants.—Anderson v. Mining Co., 50 Pac. 815.

7. Common Master.

[a] (U. S. C. C. A. 9th Circuit, 1895) An engine hostler and wiper employed by a railroad company, in charge of a locomotive, taking it from the coal bunkers to the roundhouse in the yards of a terminal company, and a car accountant employed by the terminal company, were not fellow servants.—Railroad Co. v. Craft, 16 C. C. A. 175, 69 Fed. 124.

[b] (U. S. C. C. A. 7th Circuit, 1897) A brakeman on a train of a lessor railroad company, which is using the leased tracks jointly with the lessee, under the general regulation and control of the latter, is not a fellow servant with those in charge of a train owned by the lessee, with which the former train collides.—Bosworth v. Rogers, 27 C. C. A. 285, 82 Fed. 975.

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[c] (U. S. D. C. N. Y. 1896) Where one employed to do repair work on shipboard by day's labor sends his servant to do the work in his place, the servant is to be regarded as the fellow servant of the ship's carpenter, in respect to an injury to him resulting from alleged negligence of the carpenter.—Saunders v. The Coleridge, 72 Fed. 676.

[d] (D. C. 1894) A porter of a Pullman car run as a part of a train, under a contract between the Pullman Company and a railway company, is not a fellow servant of a switchman in the employ of the railway company.—Hughson v. Railroad Co., 2 App. D. C. 98.

[e] (Mo. Sup. 1894) A porter of a palace car, whose duties are to collect fares and wait on passengers in such car, and who, by his contract with the car company, and the contract between the latter and the railroad company, is subject to the rules of the railroad company, is not a fellow servant of the engineer and conductor operating the train of which such car is a part.—Jones v. Railway Co., 28 S. W. 883, 125 Mo. 666.

[f] (N. J. Sup. 1895) To constitute the relation of fellow servants, the service must be under the same master, and the employment must be one having a common object.—Hardy v. Railroad Co., 31 Atl. 281, 57 N. J. Law, 505.

[g] (N. J. Sup. 1896) A milling company contracted with a railroad company to furnish, at a specified price, the materials for rebuilding certain railroad bridges of the latter company, and also skilled workmen to make the repairs. The workmen furnished were previously in the regular employ of the milling company, and after entering on the new work continued to be paid by it, though, after payment, that company was repaid by the railroad company with an added percentage. The work was done under direction of the railroad company's engineers, but foremen of gangs were among the men furnished. *Held*, that the railroad company could not complain that it was submitted to the jury whether one of the men so furnished, not a foreman, was in its employ, and hence not entitled to recover of it for injuries received while engaged in said work as a result of the negligence of a locomotive engineer employed by the railroad company.—Railroad Co. v. Hardy, 34 Atl. 986.

[h] (N. Y. Sup. 1895) The trainmen of a railroad company which runs its trains over the road of defendant company, under a contract by which defendant's superintendent arranges all the time tables and controls the conductors of the other company, are not fellow servants with defendant's employés, though the same person is general manager of both roads, and one person is superintendent of both on the division where the accident occurred.—Tierney v. Railroad Co., 32 N. Y. Supp. 627, 85 Hun, 146.

[i] (N. Y. Sup. 1895) Defendant's railroad was also used by the P. Company under an agreement between the two companies providing that each pay a share of the expense of keeping the road in proper condition, including the wages of yard master, switchmen, etc.; that the railroad and the employés referred to in the agreement should be under the exclusive direction of defendant; and that, such employés "being joint employés, and being paid by each party in proportion to the business done by such party, it is agreed that each party shall be responsible for the acts of such joint employés when engaged in that party's business." *Held*, that a switchman was not a fellow servant of the trainmen of the P. Company.—Strader v. Railroad Co., 33 N. Y. Supp. 761, 86 Hun, 613.

[j] (N. Y. Sup. 1895) A deck hand of a vessel discharging a cargo of wheat into an elevator is not a fellow servant of a "scooper," who works in the hold of the vessel shoveling out the wheat, where entire charge of the work is given to a "boss scooper" appointed by the elevator company, and he is paid by the company a share of its charge for transferring the wheat to the elevator, and the boss scooper employs, discharges, and pays the scoopers, but has no control over the vessel or its crew, or the work performed by them on the vessel while the work of unloading is in progress.—Kane v. Transportation Co., 35 N. Y. Supp. 581, 90 Hun, 65.

[k] (N. Y. Sup. 1896) One who rents a room containing machinery operated by men employed by the lessor is the master of the men so employed, where they are engaged wholly with his work, and subject entirely to his control; and they are the fellow servants of a person employed by the lessee to work

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under the direction of one of them.—Rozelle v. Rose, 39 N. Y. Supp. 363, 3 App. Div. 132.

[l] (N. Y. Sup. 1897) Plaintiff, while in the employ of a third party as a teamster, was temporarily hired by him to defendant, and set to hauling stone under the direction of defendant's foreman, and with the assistance of his servants, and, while performing such service for defendant, was injured through the negligence of one of his assistants. *Held* that, as defendant was plaintiff's master at the time of such injury, and was also the master of the person whose negligence caused the injury, such person and plaintiff were fellow servants.—Cunningham v. Improvement Co., 46 N. Y. Supp. 954, 20 App. Div. 171.

[m] (Ohio C. C. 1896) A contractor, employing plaintiff, contracted to handle ore for a dock company, and to furnish the laborers, subject to the approval of the company, while the company was to furnish the necessary machinery, and men to operate the same. By the negligence of the person in charge of the hoist, an iron bar was allowed to fall upon plaintiff, to his injury. *Held*, that the person in charge of the hoist was a fellow servant of plaintiff, for whose negligence the dock company was not liable.—McCafferty v. Dock Co., 11 Ohio Cir. Ct. R. 457, 1 O. C. D. 262.

[n] (Pa. Sup. 1894) Plaintiff, an employé of an iron company, who was injured, while unloading cars, by their being suddenly shifted, was not a fellow servant of the shifting crew, though the shifting was done under orders of the iron company's foreman in charge of the unloading, nor was plaintiff a quasi employé of defendant, within Act April 4, 1868, relieving defendant from liability for injuries to such persons through the negligence of its employés.—Noll v. Railroad Co., 30 Atl. 157, 163 Pa. St. 504.

[o] (Tex. Civ. App. 1896) A complaint in an action by a railroad porter against the company and an express company for injuries received while assisting an express messenger to unload goods from an express car, alleging that defendants had a common arrangement for unloading express matter, whereby the servants of one assisted those of the other, and that the injury was caused by the negligence of the express messenger in unloading some of the goods, showed that plaintiff and such messenger were fellow servants.—Railway Co. v. Taylor, 35 S. W. 855.

[p] (Can. Sup. 1894) Whether a workman of a gas company laying a main in a public street was a fellow servant with plaintiff, a plumber procured by the gas company from his employer for certain work, was a question of fact for the jury.—Gaslight Co. v. Hatfield, 23 Can. Sup. Ct. 164.

8. Common Employment—In General.

[a] (Ill. Sup. 1895) It is proper to charge that, to constitute fellow servants, the servants should be actually co-operating at the time of the injury in the particular business in hand, or their usual duties should bring them into habitual consociation with each other, so that they might exercise an influence upon each other promotive of proper caution for their personal safety.—Railroad Co. v. O'Brien, 40 N. E. 1023, 155 Ill. 630.

[b] (Ill. App. 1896) That an employé was only temporarily engaged at a particular task, and had no acquaintance with his co-laborers, does not bar the application of the doctrine of fellow servants.—Klees v. Railroad Co., 68 Ill. App. 244.

[c] (Ill. App. 1897) Fellow servants are employés of a common master whose duties bring them into habitual association, and who exercise a mutual influence promotive of caution.—Lumber Co. v. Ligas, 68 Ill. App. 523.

[d] (S. C. Sup. 1897) Persons employed in a common undertaking sustain towards each other the relation of fellow servant, when exercising the ordinary duties of their employment, even when they work apart, and cannot see each other.—Wilson v. Railway Co., 28 S. E. 91.

9. —— Railroad Employes.

[a] (U. S. C. C. A. 6th Circuit, 1895) A telegraph operator at a station on a railroad and the engineer of a train running on the road are fellow servants.—Railroad Co. v. Camp, 13 C. C. A. 233, 65 Fed. 952.

[b] (Ill. App. 1893) A "hostler" and a "helper" in the employ of a railroad

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company are fellow servants, their duty being to take care of engines at a roundhouse.—Railroad Co. v. Massig, 50 Ill. App. 666.

[c] (Ill. App. 1893) Railroad section men, and members of the "fence gang," are not fellow servants, though the section foreman temporarily instructs the foreman of the "fence gang" where and how work is to be done on or near his section.—Railroad Co. v. O'Brien, 53 Ill. App. 198.

[d] (Ill. App. 1894) A station agent, having charge of defendant's station grounds, side tracks, etc., is not a fellow servant of a brakeman on a pile-driver train, so as to prevent a recovery by the latter for injuries caused by the negligence of the former in leaving a car on a side track too close to the main track to allow the brakeman's train to pass.—Railroad Co. v. Biggs, 53 Ill. App. 550.

[e] (Ill. App. 1894) A hostler in a railroad company's roundhouse is a fellow servant of another employé of the company engaged in shoveling coal, drying sand, wiping engines, and doing whatever other work he is directed to do about the roundhouse and yards.—Clay v. Railroad Co., 56 Ill. App. 235.

[f] (Ill. App. 1894) A gripman and one of a wrecking crew in the employ of a cable street-railway company are not fellow servants.—Railway Co. v. Dwyer, 57 Ill. App. 440.

[g] (Ill. App. 1897) A railroad engineer is not the fellow servant of the baggageman of the same train.—Railroad Co. v. Swan, 70 Ill. App. 331.

[h] (Ill. App. 1897) A foreman and gang of men were building stone walls for a railroad company by contract, under which the railroad company furnished switching and side-track facilities to place the stone where it was to be used, the foreman directing the trainmen where he wanted the cars placed, but having no voice in saying how they should be got there. *Held*, that the foreman and the trainmen were not fellow servants.—Railroad Co. v. McCowan, 70 Ill. App. 345.

[i] (Ky. App. 1895) A railroad engineer and a porter on the train are not fellow servants.—Railway Co. v. Palmer, 33 S. W. 199, 98 Ky. 382.

[j] (La. Sup. 1894) A fireman in a factory is not a fellow servant of the engineer in charge of the machinery.—Mattise v. Manufacturing Co., 16 South. 400, 46 La. Ann. 1535.

[k] (Mo. Sup. 1894) Plaintiff, a section foreman on the railroad operated by defendants as receivers, was injured by coal thrown from a passing engine by the fireman, who had fastened it to a letter of instructions given him by the road master for delivery to plaintiff. *Held*, that the receivers were not liable, as principals, for the negligent manner in which the fireman delivered the message. Barclay, Brace, and Burgess, JJ., dissent.—Card v. Eddy, 28 S. W. 753, 979.

[l] (Neb. Sup. 1895) Brakemen engaged in running the same train are fellow servants.—Railroad Co. v. Howard, 63 N. W. 872, 45 Neb. 570.

[m] (Neb. Sup. 1896) The foreman of a section crew and an engineer in charge of a locomotive drawing a train not connected with the work of the section men are not fellow servants within the meaning of the rule forbidding a recovery for injuries caused by the negligence of a fellow servant. Railroad Co. v. Erickson, 59 N. W. 950, 41 Neb. 1, followed.—Railroad Co. v. Krayenbuhl, 67 N. W. 447, 48 Neb. 553.

[n] (R. I. Sup. 1895) A yard conductor, assigned to take charge of a switch in the temporary absence of the switchman, is a fellow servant of a fireman on a locomotive.—Parker v. Railroad Co., 30 Atl. 849, 18 R. I. 773.

[o] (Tex. Sup. 1896) By Laws 1893, p. 120, four requisites are given in section 2 to constitute co-employés fellow servants: They must (1) be engaged in the common service, (2) in the same grade of employment, (3) working together at the same time and place, and (4) to a common purpose. *Held*, that an engineer and a switchman, who were members of the same switching crew, engaged in switching cars under a common foreman, were fellow servants, although employed and discharged by different superiors. The proviso to said section, that "nothing herein contained shall be so construed as to make employés * * * fellow servants with other employés engaged in any other department or service," has reference to the subdivision of the business, and restricts the construction of the words, "engaged in the common service," so as to include those only engaged in the same subdi-

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vision of work, and not all serving the common employer in the same branch or kind of work.—Railway Co. v. Warner, 35 S. W. 364, 89 Tex. 475.

[p] (Tex. Civ. App. 1895) A section foreman and men operating a train are not fellow servants.—Southern Pac. Co. v. Ryan, 29 S. W. 527.

[q] (Tex. Civ. App. 1895) A railroad company's yard master is not a fellow servant of a brakeman.—Railroad Co. v. Sipole, 29 S. W. 686.

[r] (Tex. Civ. App. 1895) An engineer and a brakeman upon a railway train are not fellow servants, within the meaning of Acts 22d Leg. p. 25, c. 24, providing that all persons "engaged in the common service of" railroads, and who work "together at the same time and place, to a common purpose, of the same grade," but have no superintendence or control of others, are fellow servants.—Railway Co. v. Bowles, 30 S. W. 89.

[s] (Tex. Civ. App. 1895) In the absence of statute, a yard master and car repairer, neither having control of and power to discharge the other, are fellow servants, and the receivers of a railroad company are not liable for an injury to a car repairer by the negligence of the yard master and other employés.—Railway Co. v. Reynolds, 30 S. W. 846.

[t] (Tex. Civ. App. 1895) Under Gen. Laws 1891, c. 24, which declares all persons fellow servants who are engaged in the common service of a railway company, and are working together at the same time and place to a common purpose, of same grade, conductors of switch engines in the same yard, engaged in moving cars, etc., under a common superior, but whose duties are separate and distinct, are fellow servants.—Railroad Co. v. Tatman, 31 S. W. 333, 10 Tex. Civ. App. 434.

[u] (Tex. Civ. App. 1895) A station agent is not a fellow servant of a train crew, under Acts 22d Leg. c. 24, providing that "all persons who are engaged in the common service of railway corporations working together at the same time and place to a common purpose," etc., are fellow servants.—Railway Co. v. Calvert, 32 S. W. 246, 11 Tex. Civ. App. 297.

[v] (Tex. Civ. App. 1895) A locomotive engineer and an employé of the company acting as hostler are not fellow servants, under the "fellow servant act" of March 10, 1891.—Railway Co. v. Leighty, 32 S. W. 799.

[w] (Tex. Civ. App. 1895) Under Laws 1893, p. 120, providing that, in order to be fellow servants, employés must be in the common service, in the same department, of the same grade, working together at the same time and place, to a common purpose, an engineer of a road locomotive, who was under the control of the train master, is not a fellow servant with employés in the yard, who were under the supervision of the yard master, unless in the performance of his duties he became temporarily subject to the yard master while operating in the yard, but he was not then a fellow servant with the yard master himself.—Railway Co. v. Harding, 33 S. W. 373, 11 Tex. Civ. App. 497.

[x] (Tex. Civ. App. 1895) Under Gen. Laws 1891, c. 24, § 2, declaring all persons fellow servants who are engaged in the common service of a railway company, and are working together at the same time and place to a common purpose, of the same grade, a hostler, whose duty it is to bring the engines into the roundhouse and take them out when necessary, and a boiler washer, whose duty it is to clean the boilers of the engines so as to fit them for further service,—both being under the orders of the roundhouse foreman, and without authority over each other,—are, as a matter of law, fellow servants.—Railway Co. v. Whitaker, 33 S. W. 716, 11 Tex. Civ. App. 668.

[y] (Tex. Civ. App. 1897) A brakeman in a freight train and a foreman of a switch engine, engaged in making up said train, are fellow servants.—Sanner v. Railway Co., 43 S. W. 533.

[z] (Va. Sup.) An engineer and brakeman on the same train are fellow servants.—(1895) Railroad Co. v. Brown, 22 S. E. 496, 91 Va. 668; (1897) McDonald's Adm'r v. Railroad Co., 27 S. E. 821.

10. —— Other Employes.

[a] (U. S. C. C. A. 7th Circuit, 1898) Where a servant is injured through the negligence of the engineer in charge of the engine operating the cage in which he is being lowered to a mine, such negligence is that of a co-employé,

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and the master is not liable.—Coal Co. v. Patting, 30 C. C. A. 168, 86 Fed. 433.

[b] (Cal. Sup. 1896) The sling man of a stevedore's crew employed to load a vessel, whose duty it is to stand on the wharf and attach the hoisting tackle to the articles to be loaded, is a fellow servant of the riggers, whose duty it is to set up and rig the hoisting apparatus to the vessel.—Burns v. Sennett, 44 Pac. 1068.

[c] (Colo. App. 1896) A teamster employed by a tramway company to haul coal to its power house and an employé of the company in charge of its boilers at such power house are fellow servants.—Tramway Co. v. O'Brien, 44 Pac. 766, 8 Colo. App. 74.

[d] (Ill. App. 1896) Where the explosion of a boiler is due to a failure of the engineer to keep enough water in the boiler, the fireman cannot recover for injuries received thereby.—Railroad Co. v. Butler, 69 Ill. App. 128.

[e] (Mo. App. 1893) An engineer in charge of an engine which operates an apparatus used to hoist lumber to the upper floors of a building in course of erection, and a workman on the building who receives the lumber, are prima facie fellow servants.—Sheehan v. Prosser, 55 Mo. App. 569.

[f] (Mo. App. 1894) The foreman of the shipping department in a packing house, and carpenters, who were at work therein, but not under such foreman's charge, were not fellow servants.—Musick v. Packing Co., 58 Mo. App. 322.

[g] (N. M. Sup. 1897) A coal-mining company's employés who assist in the getting out of coal, without actually drilling holes or doing any blasting with powder, are fellow servants of employés who are so engaged, and are paid according to the quantity of coal mined.—Railroad Co. v. Deserant, 49 Pac. 807.

[h] (Pa. Sup. 1894) One unloading coal from a car is a fellow servant of one employed by the same master to place cars in a position for unloading. —Rehm v. Railroad Co., 30 Atl. 356, 164 Pa. St. 91.

[i] (Wis. Sup. 1898) One of the buckets used at a coal dock to convey coal from vessels to bins failed to automatically right itself and latch when dumped, whereupon the hoister, by use of his levers, succeeded in latching it. On the next trip of such bucket, the same thing occurred. On the following trip, it hung so low that it scraped several hundred pounds of coal off the bins, which fell on an employé working below them, and injured him. From the time the bucket first failed to work until the accident occurred was about 15 minutes. The bucket had been working perfectly for three hours that morning before the accident. *Held* that, if there was any negligence, it was on the part of the hoister, who was a fellow servant.—Prybilski v. Railway Co., 74 N. W. 117.

11. Servants Exercising Authority or Control Over Others—In General.

[a] (U. S. Sup. 1896) Negligence of a section foreman in running at dangerous speed the hand car upon which he is going, with his gang, to their place of work, so that an accident occurs, resulting in injury to one of the employés on the car, is negligence of a fellow servant, for which the company is not liable, and it is error to submit to the jury the question of such negligence. 2 C. C. A. 380, 51 Fed. 562, reversed.—Railroad Co. v. Charless, 16 Sup. Ct. 848, 162 U. S. 359.

[b] (U. S. C. C. A. 9th Circuit, 1894) A foreman of a railroad's bridge carpenters, who has, by the order of his superior (the superintendent of the bridge-building department), gone on a train, to be transported to his place of work, is not, while being transported, a fellow servant of the conductor.—Railroad Co. v. Beaton, 12 C. C. A. 301, 64 Fed. 563.

[c] (Ga. Sup. 1895) A chain-gang boss is not a fellow servant of a chain-gang prisoner, and hence the employer of the boss is responsible for his negligence.—Boswell v. Barnhart, 23 S. E. 414, 96 Ga. 521.

[d] (Neb. Sup. 1897) The best evidence that one is, as to his co-employés, a vice principal, is that they are under his supervision and control, and subject to his orders.—Railway Co. v. Doyle, 70 N. W. 43, 50 Neb. 555.

[e] (Va. Sup. 1897) In the absence of a statutory enactment, the master's liability for the negligent act of one servant against another is determined solely by the question whether the act of the negligent servant was in the

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performance of a duty imposed by the common law upon the master towards the injured servant, and not whether the negligent servant has been placed by the master in a position of superior grade, or in authority and control over the injured servant. Hence a conductor and a brakeman are fellow servants, so as to preclude a recovery from the railroad company for a brakeman's death, where it was caused by the negligence of the conductor in running the train in violation of rule.—Railroad Co. v. Houchins' Adm'r, 28 S. E. 578.

[f] (W. Va. Sup. 1897) All servants engaged in the common service of the same master in conducting and carrying on the same general business, in which the usual instrumentalities are employed, are fellow servants, though one be superior in authority to the other.—Jackson v. Railroad Co., 27 S. E. 278.

12. —— Agents and Heads of Departments.

[a] (Ga. Sup. 1896) An agent or employé of a corporation, who, in the discharge of his general duties, has charge of a particular branch or department of the corporation's business, as to which he acts in the capacity of a vice principal, and as such employs and has control of all of the subordinate servants who are to work under him, is, as to one of those whose duty it is to obey his orders, and who takes his orders from no other source, a quasi master, and not a fellow servant, in the sense that the subordinate will have no right of action against the corporation for personal injuries caused without fault on his part by the negligence of the superior.—Taylor v. Marble Co., 27 S. E. 768.

[b] (Ohio C. C. 1895) Under Act April 2, 1890, § 3 (87 Ohio Laws, 150), a yard master, whose duty it is to make up trains, and select the employés who are to operate them, and who has full control over all employés whose duties take them into the yard, is not the fellow servant of a brakeman on a train made up under such yard master's direction.—McCann v. Pennsylvania Co., 10 Ohio Cir. Ct. R. 139, 3 Ohio Dec. 444.

13. —— Power to Employ and Discharge.

[a] (U. S. Sup. 1897) A mere foreman of a gang of laborers employed by a corporation, who is not the manager or superintendent of any department of its business, is a fellow servant of the men working under him, and it is immaterial whether or not he has power to employ and discharge them. 12 C. C. A. 225, 64 Fed. 462 (1894), reversed.—Mining Co. v. Whelan, 18 Sup. Ct. 40, 168 U. S. 86.

[b] (Ill. Sup. 1894) Where a laborer on a work train is injured by the negligence of one who is both conductor of the train, and also foreman of the laborers,—having, in the latter capacity, power to hire and discharge the laborers at his discretion,—the question whether they are fellow servants is for the jury. Baker, J., dissenting. Abend v. Railroad Co., 111 Ill. 202, distinguished. 52 Ill. App. 556, affirmed.—Railroad Co. v. Massey, 38 N. E. 787, 152 Ill. 144.

[c] (Ill. Sup. 1896) A servant directed to take other servants, to be selected by him, and unload heavy machinery from a dray by means of a crane, may act in such work as a vice principal, though he has no authority to discharge the servants under him. 60 Ill. App. 519 (1895) affirmed.—Fraser & Chalmers v. Schroeder, 45 N. E. 288, 163 Ill. 459.

[d] (Minn. Sup. 1895) The foreman of a crew of common laborers, of which plaintiff was a member, having authority to hire and discharge men, and superintend the work of constructing and repairing bridges, in the absence of defendant's engineer, *held* to be a vice principal, for whose negligence, resulting in injury to plaintiff, defendant is liable. Canty, J., dissenting.—Blomquist v. Railway Co., 62 N. W. 818.

[e] (Minn. Sup. 1898) A foreman intrusted with the execution of the work of blasting rock and digging trenches for water mains, who has authority to give all orders to men as to how and where they should work, and to discharge them, is a vice principal.—Stahl v. City of Duluth, 74 N. W. 143.

[f] (Mo. App. 1894) A foreman of a gang of section hands of a railroad company, with authority to employ men and direct them how, when, and

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where to work, is a vice principal.—Claybaugh v. Railway Co., 56 Mo. App. 630.

[g] (Neb. Sup. 1897) A section hand, who, with his fellow workmen and the boss who controlled them, while working on the section, is employed on a gravel train subject to the orders of a foreman having no power to hire or discharge such workmen, is not a fellow servant of the foreman.—Railway Co. v. Doyle, 70 N. W. 43, 50 Neb. 555.

[h] (N. Y. Sup. 1897) The track master of a cable-road company, who has authority to hire men, and has sole charge of a squad of workingmen under him, represents the company, and is not a fellow servant of the workers under him. Judgment (45 N. Y. Supp. 1039) affirmed.—Mullane v. Railroad Co., 46 N. Y. Supp. 957, 21 Misc. Rep. 10.

[i] (N. C. Sup. 1895) Where a section boss has full power to hire, command, and discharge those working under him, he is not a fellow servant.—Logan v. Railroad Co., 21 S. E. 959, 116 N. C. 940.

[j] (Pa. Sup. 1898) The chief engineer of a refrigerator company having general charge of the engine room and freezing department, of which he is foreman, and in which capacity he gives orders to the men in that department, and the authority to engage men for short jobs in the manager's absence, is not a vice principal, so as to make the master liable for his negligence in directing removal in a certain manner of ice from the pipes, resulting in the fall of the pipes and injury to the employé.—Prevost v. Refrigerating Co., 40 Atl. 88, 42 Wkly. Notes Cas. 185.

[k] (Tex. Sup. 1895) The foreman of the switch yard of a railway company, having power to employ and discharge other employés, who are subject to his control, is not the fellow servant of such employés, as regards his acts in assisting in the making up of trains.—Railway Co. v. Reed, 31 S. W. 1058, 88 Tex. 439.

[l] (Tex. Civ. App. 1897) Independent of the fellow servants act, a section foreman, having authority to employ and discharge the men working under him, is, in his relation towards such men, a vice principal of the railroad company.—Railway Co. v. Hannig, 41 S. W. 196.

[m] (Wash. Sup. 1896) The foreman of a gang of men employed by a railroad company, and engaged in quarrying rock, and transporting it over the company's road for its use, who has full power to carry out the work, and to employ, discharge, and control such men, is not a fellow servant of such employés, though such foreman is under the direction of the road master of the division of the road on which such men are employed.—McDonough v. Railway Co., 46 Pac. 334, 15 Wash. 244.

14. —— Power to Direct Manner of Doing Work.

[a] (U. S. C. C. A. 9th Circuit, 1894) Plaintiff worked in a gang under a boss whose duties were to see that the men did their work, direct them where to work, choose the times for a certain dangerous operation, and give notice that it was to be performed, and there was a conflict of evidence as to the authority of the boss to hire and discharge men. *Held*, that it was for the jury to determine whether plaintiff and the boss were fellow servants.—Mining Co. v. Whelan, 12 C. C. A. 225, 64 Fed. 462.

[b] (U. S. C. C. A. 6th Circuit, 1898) A carpenter engaged with laborers in setting posts along a railroad, his duties being to make measurements, direct the digging of holes, and to see that the posts are properly set, under the direction of a foreman in charge of the work, is a fellow servant of such laborers, under the Arkansas statute.—Hunter v. Bridge Co., 29 C. C. A. 206, 85 Fed. 379.

[c] (Cal. Sup. 1896) An assistant foreman in a horseshoe shop and a boy operative who is under his control and subject to his orders are not fellow servants.—Foley v. Horseshoe Co., 47 Pac. 42, 115 Cal. 184.

[d] (Ga. Sup. 1897) One who is employed as engineer, but who is likewise under a duty to obey generally the orders of a person who is placed in authority over him, with power to withdraw him temporarily from his special work, and assign him to other duties, is not his fellow servant.—Blackman v. Electric Co., 29 S. E. 120.

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[e] (Mass. Sup. 1898) Evidence that a foreman in a repair shop directed the movements of two workmen in lowering a truck does not justify a finding that he was a person whose sole or principal duty was that of superintending, within St. 1887, c. 270, § 1, cl. 2, relating to fellow servants, where he cooperated in performing the manual labor.—Cunningham v. Railroad Co., 49 N. E. 440.

[f] (Mich. Sup. 1895) Plaintiff was employed to load onto cars and remove from a mine the ore as it was brought to the floor by the miners. It was the practice, as successive spaces were cleared of ore, to support the roof by timbers put in on notice from the miners or through the shift boss. Before a newly-opened space had been put in condition for the timber men, and before they were notified that their services were required, plaintiff was injured by ore falling from the roof. There was evidence that too large a space had been mined, and that just before the accident the foreman's attention had been called to the roof, and he said that it was all right. *Held* that, if there was any negligence, it was that of a fellow servant.—Petaja v. Mining Co., 64 N. W. 335, 106 Mich. 463.

[g] (Minn. Sup. 1897) Because one is told by his employer to do whatever another employé tells him to do in completing certain work he does not necessarily cease to be a fellow servant of such other.—Lundberg v. Carpenter Co., 70 N. W. 1078, 68 Minn. 135.

[h] (Minn. Sup. 1897) It being the absolute duty of defendant to give reasonable orders and instructions to inexperienced workmen in the work of blasting, if he delegated entire control of the work to a foreman, with unrestricted authority to direct the men to do the work, and how to do it, the foreman was a vice principal in the discharge of the duties so delegated to him, for whose negligence, if any, in directing the plaintiff, an inexperienced workman, to work at blasting, defendant is liable.—Holman v. Kemp, 73 N. W. 186.

[i] (Mo. Sup. 1897) Where a superintendent of streets has charge of the construction of a sewer, and provides all the materials for braces, and directs how they shall be put, and the work is done accordingly, the negligence, consisting of the improper bracing, which results in injury to a laborer digging the trench, is not that of a fellow servant, though a foreman is in immediate charge of the work.—Donahew v. City of Kansas City, 38 S. W. 571, 136 Mo. 657.

[j] (Mo. Sup. 1897) A foreman in charge of a gang of men operating a steam shovel is a vice principal.—Bradley v. Railway Co., 39 S. W. 763, 138 Mo. 293.

[k] (N. J. Err. & App. 1897) A laborer was called from his special work, and, with others, directed by their foreman to raise by hand a large frame. Through lack of bracing or fastening, the frame fell, and injured him. *Held*, that the foreman was a fellow servant with the laborers, and that his negligent use of, or failure to use, proper appliances provided by the master, did not entail liability on the master.—McLaughlin v. Iron Works, 38 Atl. 677.

[l] (N. Y. Sup. 1894) A foreman having full charge of work, and empowered to give all directions to the workmen, is not a fellow servant with the workmen.—Kimmer v. Weber, 30 N. Y. Supp. 1103, 81 Hun, 599.

[m] (N. Y. Super. 1895) Where the manner of doing the work has been intrusted to the foremen, they are, in that respect, fellow servants of the workmen.—Collins v. Crimmins, 31 N. Y. Supp. 860, 11 Misc. Rep. 24.

[n] (N. Y. Super. 1895) In an action for injuries caused by the fall of a derrick which had been set up under the direction of defendant's foreman, there was evidence that one of the stay ropes was insecurely fastened, but not that the derrick was defective or unsuitable for the purpose intended if properly adjusted. *Held*, that defendant owed no duty to plaintiff to see that the derrick was properly set up, and was not liable for the foreman's negligence.—Kennedy v. Iron Works, 33 N. Y. Supp. 630, 12 Misc. Rep. 336.

[o] (Ohio C. C. 1894) A locomotive engineer is not a fellow servant of an employé who works under his immediate personal charge, and subject to his direction.—Railroad Co. v. Sutherland, 12 Ohio Cir. Ct. R. 309.

[p] (R. I. Sup. 1898) A superintendent in charge of the work of moving and erecting a telephone pole, the moving to be done by having one end placed on

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a carriage, is a fellow servant of the workmen in directing them to "let go" before the carriage has been backed far enough under the pole.—Morgridge v. Telephone Co., 39 Atl. 328.

[q] (Tex. Civ. App. 1895) The foreman of a bridge gang and a mechanic working under his superintendence are not fellow servants, and the employer is liable for the negligence of the former whereby the latter is injured.—Railway Co. v. McDonald, 31 S. W. 72.

[r] (Wis. Sup. 1897) Plaintiff, while working for defendant with a gang employed in moving coal, was injured by the falling of an overhead timber, to which a bucket for hoisting the coal was attached. It was shown that such timber was not a customary appliance in moving coal, and that it was put up at the direction of plaintiff's foreman, before plaintiff began work on the coal, by one employed by the same master to do only mechanical work, and whose work had no connection with that of the coal gang. *Held*, that the negligence was that of the foreman, and not that of a fellow servant.—Jarnek v. Dock Co., 73 N. W. 62.

15. —— As Affected by Character of Work.

[a] (U. S. C. C. A. 4th Circuit, 1894) Railroad section men and laborers on repair trains, employed by the same master for the same general purpose of keeping the roadbed and track in order, are fellow servants; and the employer is not liable for injuries to one, caused by negligence of another, though such other has control over a gang of men.—Thom v. Pittard, 8 U. S. App. 597, 10 C. C. A. 352, and 62 Fed. 232.

[b] (U. S. C. C. Pa. 1896) A foreman having charge of, and personally assisting a gang of laborers employed on one of several buildings being erected by, and under the supervision of, a general contractor, is a fellow servant with such laborers.—Coulson v. Leonard, 77 Fed. 538.

[c] (Cal. Sup. 1896) Under a provision in a construction contract that "the contractor must keep upon the works at all times a responsible agent," defendant appointed B. as superintendent. The men employed by defendant were divided into several crews, with each of which there was a foreman. B. was in charge of them all, and himself at times helping in the work. If one portion of the work was in advance of the others, the men were taken from that, and placed at work on other portions. The men were all engaged in the same general business. *Held* that, with reference to those acts which were not within the personal duties of defendant, B. was but a fellow servant with all of the other employés, within Civ. Code, § 1970, who also were all fellow servants.—Callan v. Bull, 45 Pac. 1017, 113 Cal. 593.

[d] (Cal. Sup. 1897) In putting a jackscrew into position, blocks for a foundation had to be thrown down 10 or 12 feet. The workmen above inquired if the way was clear, and several workmen, as well as the contractor's superintendent of construction, answered that it was. A workman in the way below was struck by a falling block. The superintendent was near him, and was negligent in not seeing him before he answered the workman above. *Held*, that the injured workman and the superintendent, as to the act causing the injury, were fellow servants.—Donnelly v. Bridge Co., 49 Pac. 559, 117 Cal. 417.

[e] (Ill. App. 1897) A foreman and carpenters composing his crew are not fellow servants.—Leiter v. Kinnare, 68 Ill. App. 558.

[f] (Ill. App. 1897) A foreman engaged with a laborer in unloading barrels from a wagon is his fellow servant.—Beckstein v. Gall, 69 Ill. App. 616.

[g] (Ind. App. 1894) A foreman in charge of a gang engaged in loading rails, and actually assisting therein, is, as to such work, a fellow servant of the other members of the gang.—Railway Co. v. Isom, 38 N. E. 423, 10 Ind. App. 691.

[h] (Ind. App. 1897) A defendant railroad company's master of bridges employed E. as a foreman for the construction of a specific bridge. E. was authorized to employ, fix the compensation of, and discharge men, and employed plaintiff, who was 21 years old and inexperienced. Two weeks later, plaintiff, assisted by E. and a workman, placed a jackscrew on the bridge. In order to fasten braces, some one had to go below the screw about 10 feet. E. directed plaintiff to do this, and, in answer to plaintiff's question whether

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the screw was safe, said: "Yes; it is all right. I will watch it." Relying on the statement, plaintiff started below, and the screw slipped and fell on his hand. There was no defect in the appliances used, and plaintiff's means of observation were as good as E.'s. The work was such as plaintiff was employed to do, and he knew the attendant dangers. *Held*, that the watching of the screw by the foreman was not the duty of a principal, and hence he and plaintiff were fellow servants.—Peirce v. Oliver, 47 N. E. 485, 18 Ind. App. 87.

[i] (Ind. App. 1898) Plaintiff was, with others, moving telegraph poles several feet, by digging trenches to the place of removal. Defendant's foreman climbed a pole some distance from plaintiff, which had already been trenched, and loosened the wires, which were its only support, causing it to fall, injuring plaintiff. The work in which they were engaged was arranged by defendant's district superintendent and wire chief, and given to the foreman to carry out. This foreman assisted the men in removing the poles, but had authority to direct them, and had employed and paid plaintiff. *Held*, that the foreman was a fellow servant.—Telegraph Co. v. Bower, 49 N. E. 182.

[j] (Iowa Sup. 1894) The mere fact that an employé occasionally had authority to require other employés to help him does not render him a vice principal at such times, though they were then under his orders.—Hathaway v. Railway Co., 60 N. W. 651, 92 Iowa, 337.

[k] (Ky. App. 1897) Though a servant, by whose negligence plaintiff was injured while working in a mine, was, in the general scope of his authority, the superior of plaintiff, yet, if he was not, at the time plaintiff was injured, acting in the capacity of a superior, but was a common employé with, and engaged in the same kind of labor with, plaintiff, the master is not liable.—Railway Co. v. Wallace's Adm'r, 42 S. W. 744.

[l] (Mass. Sup. 1894) A railroad employé doing hand service in company with five or six other men, and drawing the same wages, receiving orders from a general superintendent of the work, or, in his absence, from a foreman, and, during the absence of the superintendent, giving his fellow laborers directions as to their common work, is not solely or principally a superintendent.—Dowd v. Railroad Co., 38 N. E. 440, 162 Mass. 185.

[m] (Mass. Sup. 1897) Under St. 1887, c. 270, § 1, cl. 2, making an employer liable for the negligence of a servant intrusted with and exercising superintendence, a street-railway company is not liable for the negligence of its paint-shop superintendent while acting as motorman, in shifting cars, whereby a shop employé, who was assisting in the work by guiding the trolley, was injured.—Brittain v. Railway Co., 46 N. E. 111, 168 Mass. 10.

[n] (Mass. Sup. 1897) A superintendent of a foundry, in setting up a mold for a servant to pour melted iron therein, was not exercising superintendence.—Whittaker v. Bent, 46 N. E. 121, 167 Mass. 588.

[o] (Mich. Sup. 1894) In an action to recover from a railroad company for injuries sustained by one of its employés occupied in unloading dirt from its cars and leveling it upon its premises, it appeared that plaintiff was one of a gang of men under a foreman, who directed the men where and how to work, saw that they did their work properly, assisting them therein, and himself under the control of a higher official of defendant, who was often present, but by whom he was sometimes invested with the power of discharging men. *Held*, that the foreman was plaintiff's fellow servant.—Schroeder v. Railroad Co., 61 N. W. 663, 103 Mich. 213.

[p] (Mich. Sup. 1897) Complainant was a section hand and was assisting to unload ties from a work train of defendant railroad. On the day of the injury the roadmaster directed a section foreman to take charge of the train. He had no authority outside of his work as section foreman except what was conferred upon him for the time being by the roadmaster. *Held*, that he was not such a vice principal as to entitle plaintiff to recover for injuries received through his negligence.—Morch v. Railway Co., 71 N. W. 464.

[q] (N. Y. Sup. 1896) Negligence of a foreman in the shop of a bridge manufacturing company in failing to use proper appliances furnished for removing manufactured articles from the shop, by reason of which an employé

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is injured, is the negligence of a fellow servant.—Ludlow v. Manufacturing Co., 42 N. Y. Supp. 343, 11 App. Div. 452.

[r] (N. Y. Sup. 1897) A foreman in charge of an excavation acts as a fellow servant of a laborer employed to drill holes for blasts, in directing him to draw an unexploded blast, without notifying him that it contained dynamite as well as powder. 36 N. Y. Supp. 1105 (1895) affirmed.—Vitto v. Farley, 44 N. Y. Supp. 1, 15 App. Div. 329.

[s] (N. Y. Sup. 1897) The foreman of a gang of men engaged in shoveling coal into cars from a large pile, the surface of which had been frozen, acts as a fellow servant of the men in so directing the work as to leave a projection of the frozen coal over the men at work.—Miller v. Thomas, 44 N. Y. Supp. 277, 15 App. Div. 105.

[t] (Ohio C. C. 1894) Where an employé is, by virtue of his employment, under the personal charge of a superior, the fact that at the time of the injury they are both employed in the same work will not render them fellow servants.—Railroad Co. v. Sutherland, 12 Ohio Cir. Ct. R. 309.

[u] (Ohio C. C. 1895) The fact that employés have allowed one of their number, on account of his age, to direct the work, does not constitute him a foreman of the parties, or render the employer liable for injury resulting from such employé's negligence.—Hartman v. Kloeppinger, 9 Ohio Cir. Ct. R. 433.

[v] (Va. Sup. 1897) Where plaintiff was employed as one of a gang to do heavy moving, under a boss who worked with and directed them, but received his instructions from the foreman of the shop, and had no power to discharge members of the gang, the boss was a fellow servant, and not a vice principal.—Machine Works v. Ford, 27 S. E. 509, 94 Va. 627.

[w] (Va. Sup. 1897) One who is a member of the same gang, doing the same work, and receiving the same pay as the others, but acts as a leader or foreman in the work, is not a vice principal, but a fellow servant.—Lime Co. v. Richardson's Adm'x, 28 S. E. 334.

[x] (Eng. 1894) The master of a ship is engaged in a common employment with the seamen on board, and therefore (the case not being within the employers' liability act) the owner of the vessel is not liable for injury caused to a seaman through the master's negligence. Wilson v. Merry, L. R. 1 H. L. Sc. 326, followed. Johnson v. Lindsay [1891] App. Cas. 371, approved.—Hedley v. Steamship Co., 6 Reports, 106; Id. [1894] App. Cas. 222.

16. —— As Affected by Statutes.

[a] (Ark. Sup. 1898) Under Sand. & H. Dig. §§ 6248, 6249 (providing that all persons engaged in the service of a railway corporation who have authority to direct other employés in the performance of their duties are vice principals of such corporation, and not fellow servants with such employés), the foreman of a section gang was not a fellow servant with the section hands under his control.—Railway Co. v. Rickman, 49 S. W. 56.

[b] (Ind. Sup. 1897) Rev. St. 1894, § 7083, subd. 3, providing that the rule of fellow servants shall not apply "where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation, or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf," does not make a railroad company liable for an injury to an engineer resulting from a brakeman's neglect of his duty to close a switch enjoined by the rules of the company.—Railway Co. v. Little, 48 N. E. 862.

[c] (Mass. Sup. 1895) Brakemen on cars which are moving from the impetus imparted by a locomotive shortly detached therefrom have not "charge or control" of the cars (St. 1887, c. 270), so as to entitle employés injured by their negligence to recover therefor from the railroad company.—Caron v. Railroad Co., 42 N. E. 112, 164 Mass. 523.

[d] (Mass. Sup. 1895) The foreman of a switching gang, who merely points out to the conductor of the switching train where he wishes the cars placed, has not "charge or control" of the train, within the meaning of St. 1887, c. 270, § 1, giving an employé, injured through the negligence of one so "in charge or control," a right of action against the employer.—Caron v. Railroad Co., 42 N. E. 112, 164 Mass. 523.

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17. Conductor in Charge of Train.

[a] (U. S. C. C. A. 8th Circuit, 1894) A brakeman and a conductor are fellow servants, within Comp. Laws N. D. 1887, § 3753, exempting an employer from liability to an employé for negligence of another person employed by him in the same general business.—Railroad Co. v. Hogan, 11 C. C. A. 51, 63 Fed. 102.

[b] (U. S. C. C. A. 8th Circuit, 1894) Conductors, whether charged with the duty of handling switches or of driving trains, are, so far as actions against the common master for negligence are concerned, not vice principals, but the fellow servants of all other employés engaged in the common object of securing the safe passage of trains.—Railway Co. v. Needham, 11 C. C. A. 56, 63 Fed. 107.

[c] (U. S. C. C. A. 8th Circuit, 1894) A railroad company is not liable, under the general law, for the injury of an employé on one train caused by the negligence of the conductor in its employment on another train in leaving a switch open that it was his duty to close, as the conductor and the injured employé are fellow servants.—Railway Co. v. Needham, 11 C. C. A. 56, 63 Fed. 107; Railroad Co. v. Mase, 11 C. C. A. 63, 63 Fed. 114.

[d] (Ariz. Sup. 1896) The foreman of a section on a railroad and the conductor of a work train, both of whom were engaged in clearing the track of a wreck on the section of the former, under a common superior, were fellow servants, and the foreman cannot recover from the railroad company for an injury resulting from the negligence of the conductor while riding on his train from the place of work.—Southern Pac. Co. v. McGill, 44 Pac. 302.

[e] (Ill. App. 1895) To make the conductor of a railroad train a vice principal, he should have the power to employ the members of the crew, and discharge them.—Railroad Co. v. Meyer, 65 Ill. App. 531.

[f] (Ill. App. 1896) A conductor on a street car is a fellow servant of a gripman and another conductor who are in charge of another car in the same train.—Railroad Co. v. Dudgeon, 69 Ill. App. 57.

[g] (Kan. Sup. 1898) A conductor having full charge and control of a train of cars is not a fellow servant with a brakeman who acts under his orders.—Walker v. Gillett, 52 Pac. 442.

[h] (Mich. Sup. 1897) In an action by a locomotive engineer for injuries caused by his engine running into the rear of another train standing at a station, it appeared that his was a passenger train supplied with air brakes controlled by him; that each car was also supplied with a conductor's valve, operated by pulling a cord that set the brakes; that, if the engine whistled for brakes, it was the duty of the conductor and other trainmen to pull such cord; that, if the air was shut off from the engine, it prevented the engineer setting the brakes back of the shut-off, but by pulling the conductor's cord the brakes could be set; that all the trainmen were instructed as to the use of such valve; and that plaintiff, finding he could not set the brakes as he approached such station, whistled for brakes. *Held* that, if the conductor or brakeman failed to pull such cord when plaintiff whistled for brakes, such failure was the negligence of a fellow servant, for which defendant was not liable.—Whalen v. Railroad Co., 72 N. W. 323.

[i] (Neb. Sup. 1897) A conductor in charge of a freight train sustains towards brakemen thereon employed the relation of a vice principal, and towards them his negligence in the line of his duty is presumably the negligence of his principal.—Clark v. Hughes, 71 N. W. 776.

[j] (N. Y. Sup. 1894) Conductor and fireman on different trains are fellow servants.—Herrington v. Railway Co., 31 N. Y. Supp. 910, 83 Hun, 365.

[k] (N. C. Sup. 1895) A conductor is, in his relation to those subject to his orders on the train in his charge, a vice principal.—Shadd v. Railroad Co., 21 S. E. 554, 116 N. C. 968.

[l] (N. C. Sup. 1897) The conductor of a side-tracked train stood at the switch, according to a rule making it the duty of the conductor or flagman of a side-tracked train to close the switch, and then "signal on" the train on the main track, and gave the "all right" signal to the engineer of a train moving along the main track. The switch had been left open, and a collision followed, in which said engineer was injured. *Held*, that the conduct-

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or and said engineer were fellow servants.—Pleasants v. Railroad Co., 28 S. E. 267.

[m] (N. C. Sup. 1898) An engineer who acts also as conductor of the train and a section master are fellow servants.—Wright v. Railroad Co., 29 S. E. 100.

[n] (Ohio C. C. 1897) The conductor of a railroad train, by the law of Ohio, is the representative of the company in the management and control of the train.—Railway Co. v. Hunter, 13 Ohio Cir. Ct. R. 441, 7 Ohio Dec. 206.

[o] (Tex. Sup. 1897) Under section 1 of act of March 10, 1891, which provides that any person engaged in the service of a railway corporation "intrusted * * * with the authority of superintendence, control, or command over other persons" in the service, is not a fellow servant with such other employés, the conductor of a train, who has the general superintendence of the movements of the train, and command of its employés, except when the safety of the train is involved, in which case the engineer is authorized to act on his own judgment, is not a fellow servant with the engineer, even when the latter, acting on his own responsibility, has stopped the train to repair a hot box on his engine, and the company is responsible for the negligence of the conductor in failing to flag a train following, resulting in an injury to the engineer. Judgment, International & G. N. R. Co. v. Culpepper (1897) 38 S. W. 818, affirmed.—Culpepper v. Railroad Co., 40 S. W. 386, 90 Tex. 627.

18. Train Dispatchers.

[a] (U. S. C. C. A. 6th Circuit, 1895) A train dispatcher is not a fellow servant of the engineer of a train on his division.—Railroad Co. v. Camp, 13 C. C. A. 233, 65 Fed. 952.

[b] (U. S. C. C. Ga. 1895) A train dispatcher, and a locomotive engineer injured through the dispatcher's negligence in the running of trains, are not fellow servants.—Clyde v. Railroad Co. 69 Fed. 673.

[c] (Md. App. 1894) A train dispatcher, employed by the division superintendent, though he has power to employ and discharge brakemen and flagmen, and has general charge of the movement of trains, is a fellow servant of an engineer who is also subject to the instructions of the division superintendent.—Railroad Co. v. Hoover, 29 Atl. 994, 79 Md. 253.

[d] (Tex. Sup. 1895) An engineer is not necessarily a fellow servant of the train dispatchers and telegraph operators of the railroad company. 30 S. W. 686, reversed.—Railway Co. v. Hogan, 32 S. W. 1035, 88 Tex. 679.

[e] (W. Va. Sup. 1895) A train dispatcher, who has control of the running of trains over a block section of a railroad, is not the fellow servant of a brakeman injured on such block by reason of the former's negligent management of such trains.—Flannegan v. Railway Co., 21 S. E. 1028, 40 W. Va. 436.

19. Persons Working on Separate Trains, etc.

[a] (U. S. C. C. Ga. 1895) Conductors of electric railway cars on the same road are fellow servants.—Baltimore Trust & Guaranty Co. v. Atlanta Traction Co., 69 Fed. 358.

[b] (Del. Super. 1894) The brakeman of a train, while signaling the train following his own, acts as the fellow servant of the fireman of the train to be signaled.—Wheatley v. Railroad Co., 30 Atl. 660.

[c] (Ill. Sup. 1898) A fireman of a passenger train and a freight-train crew are not fellow servants. Judgment (1897) 71 Ill. App. 147, affirmed.—Railroad Co. v. House, 50 N. E. 151, 172 Ill. 601.

[d] (Ill. App. 1893) Two switching crews employed in the same railroad yard, the one in delivering cars, and the other in receiving them, as "kicked" across the main tracks, are fellow servants.—O'Leary v. Railroad Co., 52 Ill. App. 641.

[e] (Ill. App. 1894) The members of two switching crews of a railroad company, which frequently meet when at work, their relations to each other at such times being governed by considerations of mutual safety and convenience, are fellow servants.—Railway Co. v. Malaney, 59 Ill. App. 114.

[f] (Ill. App. 1896) The crews of switch and road engines whose employ-

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ment requires them to do switching in the same yards, and to use the same tracks and switches, and makes them necessarily dependent on each other for their mutual safety, are fellow servants.—Klees v. Railroad Co., 68 Ill. App. 244.

[g] (Ill. App. 1897) A freight crew and a passenger crew on the same division of the same railroad are not fellow servants.—Railroad Co. v. Hause, 71 Ill. App. 147.

[h] (Neb. Sup. 1898) Where two switching crews are in the employ of the same railway company, subject to the control and direction of the same yard master, no member of either of said crews having any right of control or direction over any member of the other crew, both crews simultaneously engaged in switching the same cars from one part to another of the same switch yard, then the foreman of one crew and a member of the other crew are fellow servants.—Railway Co. v. Lyons, 75 N. W. 31.

[i] (Tex. Civ. App. 1895) The employés of a railroad company running a through freight are not fellow servants of employés of the same company running one of its local freights, picking up freight and empty cars.—Railway Co. v. Worthy, 32 S. W. 557.

[j] (Tex. Civ. App. 1897) Two crews employed by a railroad company worked in one yard. The inside crew was engaged exclusively in yard switching, while the outside crew, in addition to switching in the yard, was required to take cars to adjacent lumber yards and to connecting carriers. *Held*, that an inside switchman, in piloting an inside engine to its train, and an outside fireman, at work beneath his engine, were not fellow servants, within Act 1891, § 2 (Sayles' Supp. p. 498), providing that all persons engaged in the common service of a railway company, and working together at the same time and place to a common purpose, and of the same grade, neither being intrusted with any superintendence over the others, are fellow servants.—Masterson v. Railway Co., 42 S. W. 1001.

[k] (Eng. 1893) Where two vessels come into collision with each other, belonging to the same owners and the same line, and frequent the same port and river in which the collision occurred, the master and crew of one vessel are not in a common employment with the master and crew of the other vessel.—The Petrel, 1 Reports, 651; Id. [1893] Prob. 320.

20. Servants Going to or Returning from Work.

[a] (U. S. Sup. 1896) The employés of an extra freight train are the fellow servants of section hands going to their work upon a hand car, so that the negligence of the former in failing to give proper signals, whereby a collision results, does not render the company liable for injuries to one of the section men. 2 C. C. A. 380, 51 Fed. 562, reversed. Randall v. Railroad Co., 3 Sup. Ct. 322, 109 U. S. 478, and Railroad Co. v. Hambly, 14 Sup. Ct. 983, 154 U. S. 349, applied. Railroad Co. v. Ross, 5 Sup. Ct. 184, 112 U. S. 377, distinguished.—Railroad Co. v. Charless, 16 Sup. Ct. 848, 162 U. S. 359.

[b] (U. S. Sup. 1897) A railroad employé, who, after finishing his employment for the day, and leaving the workshop and grounds of the company, is injured while moving along a public highway in the city, by negligent acts of other employés of the company on its moving trains, does not stand in the relation of a fellow servant with them, in the meaning of the law applicable to injuries occurring to one servant by the negligence of another.—Fletcher v. Railroad Co., 18 Sup. Ct. 35, 168 U. S. 135.

[c] (Tex. Civ. App. 1894) An employé of a railroad company who, in obedience to an order of the company, travels in the caboose of a freight train to reach a point where he had been assigned to work, but who takes no part in the running of the train, is not a fellow servant of the engineer of the train.—Railway Co. v. Norris, 29 S. W. 950.

21. Questions for the Jury.

[a] (Ill. Sup. 1894) Whether parties are fellow servants is a question for the jury under proper definitions from the court.—Coal Co. v. Holmquist, 38 N. E. 946, 152 Ill. 581. 51 Ill. App. 507, affirmed.

[b] (Ill. App. 1893) Where the evidence is uncontradicted, the question as to the existence of the relationship of fellow servants is for the court.—O'Leary v. Railroad Co., 52 Ill. App. 641.

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[c] (Ill. App. 1893) Whether or not the relation of fellow servants exists between employés is a question of fact, and its determination by a jury will not be disturbed, unless palpably against the weight of evidence.—Railroad Co. v. O'Brien, 53 Ill. App. 198.

[d] (Ill. App. 1894) A court may define to the jury what constitutes the relation of fellow servant, but must not determine the fact of the existence of such relation.—Kimel v. Railroad Co., 55 Ill. App. 244.

[e] (Tex. Civ. App. 1894) Whether a person is a fellow employé of another, both being engaged in the same work, is a question for a jury.—Railroad Co. v. Finch, 27 S. W. 1028, 8 Tex. Civ. App. 409.

(87 Fed. 302.)

GAYNON v. DURKEE.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1898.)

No. 621.

FELLOW SERVANTS—WHO ARE.

The foreman of a railway machine shop, with authority to give orders to the men working in his department, is the fellow servant of one of the men, there being a master mechanic over both, with authority to hire and discharge.[1]

In Error to the Circuit Court of the United States for the Southern District of Florida.

The plaintiff in error brought this suit against the defendant in error to recover damages for personal injuries received while in the employ of the defendant. The plaintiff in his declaration alleges, substantially, that on the 14th day of July, 1893, plaintiff was in the employ of the defendant, and was ordered, instructed, and required by one Kern, who was an employé of the defendant, and who was the general foreman of the defendant's shops in Palatka, and under whom the plaintiff worked, and whose orders and instructions the plaintiff was required to obey, to mark a leak in the boiler or tubes of a certain locomotive in the control and use of the defendant, said locomotive having steam generated therein, and the plaintiff entered the smoke box of said locomotive for the purpose of marking said leak; that said Kern was aware that the plaintiff had entered said smoke box, and that it was the duty of the defendant to provide a reasonably safe place for the plaintiff to work, and keep the same reasonably safe while the plaintiff was working; that defendant knew it was necessary while plaintiff was in said smoke box to keep the throttles and valves of said locomotive closed, so as to prevent the steam from entering the smoke box, but the defendant recklessly, negligently, and carelessly omitted and neglected to keep said smoke box reasonably safe, and that while plaintiff was in said smoke box the said Kern, or some other person to plaintiff unknown, recklessly, carelessly, and negligently opened the throttles and valves of said locomotive, whereby the steam in said locomotive entered the smoke box, inflicting great injury upon the plaintiff. To this declaration defendant interposed a demurrer, which was overruled by the court: whereupon defendant filed the general issue plea of not guilty, and a further plea of contributory negligence. A trial of the cause was had upon issue joined on these pleas.

The facts in this case, as shown by the testimony, briefly stated, are as follows: The plaintiff in error was employed by the defendant in error as a boiler maker in the railway shops situated in Palatka, Fla. These shops were the general repair shops of the railway company, and such work was

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[1] As to who are fellow servants, see an elaborate note to Railroad Co. v. Smith, 8 C. C. A. 668, and supplementary note to Railway Co. v. Johnston, 9 C. C. A. 596.

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done in them as is usually done in the railway shops of like character. The shops were under the direct supervision and control of a master mechanic, whose office was at these shops. Mr. Rutherford, the master mechanic, employed the plaintiff and set him to work in the shops. The plaintiff was working under a foreman, also employed by defendant,—a Mr. Kern,—whose orders plaintiff was required to obey. The plaintiff in his testimony styles this man a "general foreman," but the testimony does not disclose the significance of the term "general." The testimony does show that there were other foremen employed in these shops,—a foreman of the carpenter shop and a foreman of the paint shop. The plaintiff was injured on July 14, 1893, while in the employ of the defendant. For about two weeks prior to his injury the plaintiff had been working upon a certain engine, No. 23, which was in the shops being extensively repaired. The plaintiff had put a new set of tubes in this engine, and had done considerable other work upon her. The plaintiff tested these tubes the day before with a cold-water test. On the morning of his injury this engine was fired up for the purpose of making a further test of these tubes, and one was found to be leaking. The plaintiff was sent for, and told by the foreman, Kern, that the tube was leaking, and that he had better mark it; whereupon the plaintiff entered the smoke box of the engine to mark the leaking tube. While the plaintiff was in the smoke box, Kern, the foreman, negligently opened, or caused to be opened, the valves and throttle of the engine, which allowed the steam to rush into the smoke box, whereby the plaintiff was badly scalded. The engine was hot, and had steam on, when the plaintiff entered the smoke box, but it was perfectly safe for plaintiff to enter, and would have remained safe but for the negligent act of Kern.

When the plaintiff closed his case the defendant demurred to the evidence, and the court sustained the demurrer in the following language: "I think the law upon this point is this: It is the duty of the employer, the principal, to furnish a safe place for his employés,—safe tools and appliances and surroundings,—and, if there is any presumption or good reasons to believe that there is any deficiency in those appliances or in the safety of that place, it is the duty of the principal to see that that is guarded or is watched and kept safe; but unless there is some good reason to believe that there is an innate danger, that there is a necessary presumption of danger, attending the condition of the place or the condition of the appliances, and if that danger only arises from the positive acts of some one else which cannot be anticipated and cannot be guarded against, I cannot see nor consider that it is the duty of the principal to have a plant watched or a supervision of such condition or appliances. Unless there is some good ground to believe that a watch or a general supervision is necessary for the preservation and protection of the employé, I do not consider that the employer can be held liable for any act of a fellow servant which cannot be anticipated nor which could not be presumed. That is what I consider to be the generally accepted principle of law. I consider that to be the principle of the law laid down in all of the cases which have been cited here and referred to. In the case where the party was injured by the raising or lowering of the cargo of a vessel through the hatchway, there was the constant anticipation of more or less danger that was not provided against. In the case of fire damp (Gowen v. Bush, 22 C. C. A. 196, 76 Fed. 349), there was such a constant apprehension of accumulation of fire damp, it is true, that a party was appointed for that purpose. In this case the testimony does not satisfy me that there was any reasonable presumption of danger arising from the party going into that locomotive, unless by some positive affirmative action of some party, and that the party in charge at that time, or the principal had he been present, could have had any good reason to have appointed a person whose special duty it was to see that that place was kept perfectly safe. In the case of Railway Co. v. Pool, 160 U. S. 438, 16 Sup. Ct. 338, where a party was at work under a car, which was certainly a dangerous position, he was injured by the negligence of a fellow servant in making that place dangerous; and yet the supreme court reversed the case which permitted it to go to a jury, and the jury to pass upon it, and held that the case should not have been submitted to the jury. The case was reversed and sent back. I would be very glad, indeed, if I could see any question of fact in this case,

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to submit the case to the jury; but the evidence, in my opinion, shows that the injury was caused by the positive affirmative action of a fellow servant. The question of whether or not Kern was a fellow servant is one of the difficult questions in this case; but I do not think the testimony shows that he had charge or supervision of any particular department of the operations of the road; but there was immediately over him a master mechanic, who employed and discharged employés, who supervised generally the repairing division of the road of the company. Looking at the case as I do, and as the facts I think have been determined by the testimony, I do not consider it is my privilege to submit the case, but to withdraw the case from the jury, and to direct a judgment for the defendant; which is so ordered."

Alex. St. Clair-Abrams, for plaintiff in error.
E. P. Axtell, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PER CURIAM. The judgment of the circuit court is affirmed on the authority of Railroad Co. v. Charless, 162 U. S. 329, 16 Sup. Ct. 848, and Mining Co. v. Whelan, 168 U. S. 86, 18 Sup. Ct. 40.

(87 Fed. 938.)

PEDERSON v. JOHN D. SPRECKLES & BROS. CO.

(Circuit Court of Appeals, Ninth Circuit. March 3, 1898.)

No. 418.

1. TOWAGE—METHOD OF FASTENING LINE.
On the preponderance of the evidence, *held*, that in towing a schooner it is not good seamanship, when the line is passed through the breast chock, to make it fast to the pawl bitt, as this brings it at such an angle as to put a great and uneven pressure on the chock, and a heavy strain on the line; that, if passed through the breast chock, the line should be fastened to the windlass bitt; and that the best method is to have as straight a lead as possible.

2. SAME—SPEED OF TOWAGE.
In towing a schooner about 90 feet in length, and of some 87 tons, gross, with a 5-inch Manilla line, in a smooth bay, 6 to 7 knots an hour is not excessive or dangerous speed.

3. SAME—RESPONSIBILITY FOR FASTENING TOWLINE.
When a tug takes in tow a schooner, having her own officers and crew on board, who take control and management of the fastening of the towline to their vessel, they are bound to see that it is securely fastened; and the tug is not responsible for any failure in this respect.

4. SAME—RECIPROCAL DUTIES.
A tug engaged in towing is not bound to exercise the highest possible degree of skill and care. Her duty is to use reasonable care and skill, and she has a right to expect corresponding care and skill on the part of the tow, when the latter is in charge of her own officers and crew.

5. SAME—PERSONAL INJURIES.
A tug, towing a schooner manned by her own officers and crew, *held* not liable for personal injuries occasioned to the schooner's mate by the breaking of the breast chock, through which the line was run, where the accident was due to bad seamanship of the mate, in causing the line to be run through the breast chock and fastened to the pawl bitt, instead of to the windlass bitt.

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Appeal from the District Court of the United States for the Northern District of California.

H. W. Hutton, for appellant.

Shortridge, Beatty & Brittain, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a libel in personam by Louis A. Pederson, appellant, to recover damages from the John D. Spreckles & Bros. Company for injuries received. The undisputed facts are substantially as follows: The steamer Crown of England was wrecked at Santa Rosa Island, in Santa Barbara Channel, December 1, 1894. The California Iron & Wrecking Company was employed by the owners of the Crown of England to recover the machinery from the wreck; and, to assist in this work, the company employed the schooner S. Danielson and the tugboats Kittie O'Neill and Vigilant. The schooner was owned in part by one Mrs. Gruggel, wife of its captain. It had a gross tonnage, 87.55; net tonnage, 83.20; net length, 91.9; breadth, 27.7; depth, 6.8 feet,—carried about 5 tons of iron, and was about 10 years of age, and in good condition. The tug Vigilant was owned by appellee. The S. Danielson and the Vigilant lay at anchor all night before the accident, side by side, in Beechers' Bay, on the east side of the island. On the morning of January 6, 1895, about 8 or half past 8, the S. Danielson, upon the suggestion of the tug, hauled in her anchor, and started to drift, while waiting for the tug to come alongside and take her in tow. After drifting about half a mile, the tug came alongside, and about 9 o'clock made fast to the schooner, and began towing. Appellant, who was the mate of the schooner S. Danielson, passed a 5-inch Manilla rope out to the tug, to be used in the towing. The line was passed through the breast chock on the port side, and was made fast, under his supervision, to the pawl bitt. Between 40 and 50 fathoms of line were passed out before the master of the tug Vigilant signified that they had length enough. While engaged in parceling the line, and standing on the side of the line, between the line and the capstan, the chock broke; and appellant was thrown against the capstan by the snap of the line, and his leg was broken, and so severely injured that amputation was made necessary. Some 10 or 15 minutes thereafter the line parted. The time occupied in towing before the accident is variously estimated by the witnesses at from 15 to 20 minutes.

What caused the accident? Was the appellee guilty of any negligence? The contention of appellant is that the accident was caused by the negligence of the parties in charge of the Vigilant, in towing at such an excessive rate of speed that the chock through which the towline was passed was pulled in two; that the appellee was guilty of negligence, in not supervising or directing the arrangement of the towline, in not watching the effect of her towing upon the schooner, and in towing at an excessive speed. It is claimed on behalf of appellant that there is a substantial agreement on the facts, and that the only questions involved herein are questions of law. The contention of the appellee is that the accident was caused by the acts

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of appellant and those acting under his direction, in putting the line through the breast chock, and making it fast to the pawl bitt, instead of the windless bitt; that improper steering by the captain of the schooner, in charge of the helm, also contributed to the breaking of the chock, by increasing the strain thereon; that, in failing to perform his duty in this respect, appellant was guilty of such negligence as bars him from recovering any damages. It is claimed by appellee that the questions involved herein are purely questions of fact, upon which there is a conflict of evidence, and that the decision of the trial court should not be disturbed on this ground.

The tug and the schooner were each in charge of their respective officers and crew. Each was properly manned and equipped. There were no visible defects in either. The weather was calm and clear, there was a light wind, and the water was smooth. The chock on the schooner is used to keep the line in place, and the bitt to which the line is fastened gives the strength for towing purposes. The decided preponderance of the evidence establishes the facts contended for by appellee, that it is not good seamanship upon the part of the officers and crew of the schooner, when the line is passed through the breast chock, to make it fast to the pawl bitt; that, if the line is passed through the breast chock, it should, in order to be safe, be fastened to the windlass bitt; that when the line is put in the breast chock, and fastened to the pawl bitt, it is at such an angle as to bring a great and uneven pressure on the chock, and a heavy strain upon the line; that the best method is to have as straight a lead as possible; that the straighter the lead, the safer the tow. This testimony is not in any manner weakened by the fact that the schooner had been previously towed in safety, for a longer distance, with the line placed in the breast chock, and fastened to the pawl bitt. The question as to who furnished the line, or who first suggested its use, does not clearly appear. But, in view of the other facts, it is wholly immaterial. There is no suggestion that the line was not a proper, strong, and safe one, and no claim is made as to there being any defect therein. Appellant, as the mate of the schooner, had charge and control of her forward part. He was at his post of duty. Capt. Randall had charge of the tug. He called upon the schooner to give him the end of the line. It was passed to him by appellant. Pederson, in the ordinary discharge of his duty as mate of the schooner, directed where and how the line should be placed. It was laid through the breast chock, and made fast to the pawl bitt, of the schooner. Signals were then given, and the tug started on its course. In the light of these circumstances, it seems to be a self-evident proposition that the tug could not have been at fault unless at the time of the accident she was towing at an excessive speed. Touching this point, the most that can be said in favor of appellant is that there was a conflict of evidence as to the rate of speed. Appellant's witnesses testified that in their opinion the tug was towing at a rate of 9 or 10 knots an hour, while the testimony on the part of appellee placed it at from 6 to 7 knots an hour. The question as to whether the speed was excessive is not to be determined solely from the rate. It depends upon the condition of the tow, the line, and other surroundings.

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The questions are whether she was going at such a speed that no damage would be liable to ensue therefrom; whether she was exercising due caution and reasonable diligence. If the speed of the tug caused the accident, it was excessive. The great preponderance of the evidence is—taking into consideration the tonnage and size of the schooner, the strength of the line, and state of the weather, wind, and water—that the tug was towing at a reasonable and safe speed, not exceeding 7 knots an hour, and was not guilty of any fault, and that the speed of the tug was not the proximate cause of the breaking of the breast chock on the schooner. While there was a slight conflict as to the rate of speed, the witnesses substantially agreed that 7 knots an hour was safe and reasonable. The witness Titchworth, who had been about 4 years on the Vigilant, and was on the tug at the time of the accident, and had been engaged over 10 years in the towing business, testified that the Vigilant was a steady tug in her pulling, regular in her movements, in perfect condition, and that 7 knots an hour "was a safe speed." Thompson, who was captain of the tug Rescue, in the employ of the Merchants' & Shipowners' Towboat Company, and had been engaged for 20 years in the towing business, on all kinds of boats and ships, in all parts of the coast, including the Santa Barbara Channel, under all conditions of wind and weather, testified, in reply to questions, as follows:

"Q. In towing a schooner of the dimensions and the tonnage of the Danielson, I wish you would state to the court whether it would be safe and proper to use a line of from 40 to 50 fathoms length in towing such a schooner in the Santa Barbara Channel, when the water is smooth, the wind fair, and the rope or hawser a 5-inch Manilla line? A. It would if it was smooth and the wind fair, as you say. It would be line enough. I should accept that; yes; new rope, good line,—if the distance was not too long, and I expected not to get different weather, or anything like that. Q. As to the rate of speed that it would be proper towing, with a schooner such as the Danielson, under the conditions I have named, would you say that a speed of from 5 to 6 or 7 or 8 knots would be a proper, reasonable, and careful speed to tow? A. I should say a speed of 7 or 8 knots would be all right, if it was smooth, with a new 5-inch line. I should tow that fast if I was doing it; after I got fairly started,—got way on my tow. If it was rough, and I considered it necessary to go slow, I should do so. If it was smooth, I should certainly go as fast as I could; and I think that would be just about the rate of speed,—8 knots on a vessel like that."

Capt. Harvey, assistant superintendent of the Merchants' & Shipowners' Towboat Company, who had been engaged in the towboat business for 30 years, under various conditions, and upon all kinds and character of vessels, testified as follows:

"Q. Take the schooner Danielson, whose dimensions I have given you, in the Santa Barbara Channel, with smooth water, fair wind, being towed by the tug Vigilant; would a 5-inch line—say, from 35 to 40 or 50 fathoms—be a proper length of line to have out, towing such a schooner? A. I should say it would be. Q. As to the rate of speed, captain, that it would be safe to tow a schooner under those circumstances; what would you say as to that? A. I should say it was safe for a tug to pull all it could. Q. 6 or 8 or 9 knots would be safe, in point of speed? A. Yes, sir; that line will hold that boat, and more too."

Capt. Gray, who was the superintendent of the same towboat company, and had been in the business for over 20 years, and was familiar with the Santa Barbara Channel, testified as follows:

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"Q. What would you say as to the speed which it would be safe and proper to tow a schooner of these dimensions in quiet, still water, with a tug such as the Vigilant, and with a 5-inch Manilla rope, of about 40 or 45 fathoms? A. I should tow just as fast as the tug would tow her. Q. Would it be safe speed to go at, say, 5 or 6 or 7 knots an hour? A. Yes, sir; perfectly safe."

Rosenberg, a witness for appellant in rebuttal, on cross-examination, testified as follows:

"Q. What would you say as to the speed of towing a schooner such as the Danielson, * * * smooth water, fair wind, very lightly laden with some wreckage, and it was being towed by a strong steam tug, the Vigilant; the line made fast to the pawl bitt, passing through the after port chock, and the tug ahead; what would you say as to reasonable speed to tow under those circumstances, a 5-inch Manilla rope being used? A. About 6 or 7 miles an hour."

But it is earnestly argued by appellant that the testimony is undisputed that the speed of the tugboat actually caused the breaking of the after chock. This position is sought to be maintained upon the testimony of Capt. Randall, the master of the tug Vigilant, given with reference to the manner in which the line was made fast, as ascertained by him after the accident. The testimony of the other witnesses was on the assumption that the line was properly placed and fastened. To fully understand that portion of the testimony of Capt. Randall relied upon and quoted by appellant, it is necessary to refer to other parts of his testimony. He had testified in chief that the tug started at slow speed, that after towing about 15 minutes the chock was carried away, and that at that time the tug was towing about 6 knots.

"Q. When the vessel started, how fast were you going? A. We started gradually, and gradually got on the way to about 6 knots. Q. How long after you started before you were going at the rate of about 6 knots? A. About 4 or 5 minutes. Q. For 10 minutes you had been going at the rate of 6 knots? A. Yes, sir. Q. No faster? A. No, sir. Q. The same rate of speed? A. The same rate of speed. The engine was not speeded up at all."

He further testified that the tug at the time of the accident slowed up and stopped, and, after ascertaining what had happened, again started ahead at the same rate of speed as before, and after towing 10 or 12 minutes the line parted. Upon his cross-examination the following questions were asked, and answers given:

"Q. Did you notice through which chock the towline was leading? A. Yes, sir; the breast chock. Q. Did you notice where it was made fast to? A. No, sir; I could not see that. Q. Do you think that you could break a chock line like that, towing a schooner such as the Danielson 6 knots an hour, and under the conditions you were towing her that morning? A. No, sir; not with a fair lead. Q. What do you mean by a 'fair lead'? A. A straight lead. * * * Q. You went ahead on that morning without reference to where the towline was made fast to? A. We allowed that the people on the schooner would aid us in the matter, to help us out, by not making those lines fast to the wrong place."

Next come the questions and answers so confidently relied upon by counsel:

"Q. I ask you whether on that morning you went ahead without reference to what part of the schooner the towline was made fast to? A. Yes, sir. Q. Six miles an hour was too fast, under the condition that that line was made fast? A. No, sir. Q. How did the chock come to break, then? A. It was too fast. It proved it. It certainly was too fast. Q. Under the conditions at which the line was made fast? A. It was too fast."

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It is evident that this language had reference to the condition of fastening the line on the pawl bitt after placing it in the breast chock, which was a fact unknown to the officers and crew of the tugboat until after the accident. This is made clear by the answer of the witness when recalled on behalf of the appellee:

"Q. The way in which the line was made fast, then, you did not know? A. I did not know; no, sir. Afterwards I seen where the line had been made fast, and knew the chock it was in; after we went alongside. Q. To what would you, then, attribute,—all told in one answer, covering the whole case,—in your best judgment, the breaking of the chock? A. Bad steering, and the line being made fast in the way it was, and possibly a bad casting. The speed of the vessel had nothing to do with it. It must have broke if we had been going at 2 or 3 knots."

This testimony, instead of showing that the tug was towing at an excessive speed, tends to show that the line, after passing through the breast chock, was fastened to the wrong bitt, and that the negligence was upon the part of the officers and crew of the schooner, instead of upon the part of the tug. It is shown by the testimony that the tug was fully adequate to the work. It was managed with reasonable care, judgment, and skill. It performed its duty in an ordinary, careful, and prudent manner, and did its entire duty, unless, as is claimed by appellant, it was its duty to see that the line was properly placed and fastened on the schooner before it started to tow. A vast number of authorities are cited by appellant to the effect that the tug dominates, guides, and directs; that the tow keeps in her wake, and conforms to her directions; that the tug must furnish the motive power, and direct the location of the tow; how she shall be lashed; with what fastening she shall be secured; to see that her tow is properly made up, and secured with lines of proper strength. Many of these cases are in relation to the duties of the tug in the towing of canal boats and barges, which have no life, voice, or control in making up the tow; and in all these cases it is held that it is the duty of the tug to see that the lines of the tow are properly, sufficiently, and securely fastened, and that, if the tug fails in this duty, she is guilty of a maritime fault. But such cases have no application to a case like this, where the schooner had its own officers and crew on board, and, in pursuance of the custom in this respect, took full charge, management, and control of these matters. The distinction between the cases is too manifest to require extended discussion, and is clearly illustrated in the decision of the court in The Quickstep, 9 Wall. 665, 670, which is one of the leading cases relied upon by appellant. In the course of the opinion the court said:

"If the tug, in constructing the tow, used the lines furnished by the different boats, yet, as each boat was independent of the other, no responsibility can attach to either for the breaking of the line which she did not provide, and had nothing to do with making fast."

The testimony shows, without conflict, that it is the custom, in all cases where the tow has its own officers and crew on board and in charge, for the officers of the vessel to arrange all the preliminary matters, such as placing and making fast the towline; that such matters were within the duty of the appellant to perform; and that

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he did in fact perform that duty. Every case should be determined with reference to its own peculiar facts, circumstances, and conditions. In The Allie & Evie, 24 Fed. 745, 749, Brown, J., said:

"In whatever form the question comes up,—whether as to seaworthiness, adequacy for the work, or the time of starting,—it is a practical question of reasonable prudence and judgment; and as regards seaworthiness in general, or the adequacy of the tug for the work undertaken, there is no other final criterion than the judgment of practical men versed in the business, and the customs and usages of the time and place, viewed as representing the judgment and knowledge of the time. To show this, the custom and practice of nautical men is admissible."

See, also, The Battler, 62 Fed. 612, 614, and authorities there cited; The Merrimac, 2 Sawy. 586, Fed. Cas. No. 9,478; Burns v. Sennett, 99 Cal. 363, 33 Pac. 916.

The general rule as to the duty and liability of a tug in towing is clearly expressed in The Webb, 14 Wall. 406, 414. Among other things, the court said:

"It must be conceded that an engagement to tow does not impose either an obligation to insure, or the liability of common carriers. The burden is always upon him who alleges the breach of such a contract to show either that there has been no attempt at performance, or that there has been negligence or unskillfulness, to his injury, in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services."

In The Margaret, 94 U. S. 494, 496, the court said:

"The tug was not a common carrier, and the law of that relation has no application here. She was not an insurer. The highest possible degree of skill and care were not required of her. She was bound to bring to the performance of the duty she assumed reasonable skill and care, and to exercise them in everything relating to the work until it was accomplished."

See, also, The Jacob Brandow, 39 Fed. 831; The Argus, 31 Fed. 481, 483.

The law applicable to this case is that both the tug and the tow must exercise reasonable care and skill. While the tug was bound to exercise reasonable care and skill, she had the right to expect corresponding care and skill on the part of the schooner. The Jacob Brandow, 39 Fed. 831; The Sagua v. The Grace, 42 Fed. 461; The Ciampa Emilia, 46 Fed. 866, 868; The Invertrossachs, 8 C. C. A. 87, 59 Fed. 194, 198; The Margaret, 5 Biss. 353, Fed. Cas. No. 9,068; The Allegiance, 6 Sawy. 68, Fed. Cas. No. 207; Sproul v. Hemmingway, 14 Pick. 1. The contention of appellant that the happening of the accident raised a presumption of negligence on the part of the tug cannot, therefore, be sustained. The burden of proof in this case was upon the appellant to show affirmatively, by a clear preponderance of the evidence, that the tug was guilty of negligence. 1 Shear. & R. Neg. § 57. This he failed to do, and he is not, therefore, entitled to recover any damages. It is true, as was said in The Webb, supra, that:

"There may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it."

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In The Joseph B. Thomas, 30 C. C. A. 337, 86 Fed. 662, this court said:

"There are cases where the fact that the accident happened under given conditions, and in connection with certain circumstances, will amount to evidence of negligence sufficient to charge the defendant."

See, also, 1 Shear. & R. Neg. § 59.

In cases where no questions are raised as to what caused the accident or the injury, and the circumstances are of such a character as to show that the thing which did happen would not have occurred unless there was negligence upon the part of the person having charge and control of such thing, then the presumption contended for would apply. But it would be a strange construction of this rule to apply it to a case like the one under consideration, where all the facts as to the cause of the accident are in dispute, and nothing occurred which, of itself, tended to show that the tug was at fault. On the other hand, it was the chock on the schooner that first gave way and caused the line to hit appellant, and this was the real cause of the injury to him. The presumption, therefore, if any is to be indulged in, would be that the breast chock was defective, because it broke. The line did not part for several minutes after the accident occurred, and its parting had nothing whatever to do with the injury complained of. Moreover, the testimony tended very strongly to show that it did not part on account of the speed of the tug, but was caused by chafing after the breaking of the chock.

Numerous other minor questions were discussed by counsel, which we deem unnecessary to refer to, as the views already expressed are decisive of the case. Upon the whole case, we are of opinion that the accident was caused by the negligence of those having charge of the schooner, and that the tug was not in any wise at fault. The decree of the district court is affirmed.

(87 Fed. 948.)

JAKOBSEN v. SPRINGER et al.

SPRINGER v. JAKOBSEN et al.

(Circuit Court of Appeals, Fifth Circuit. May 17, 1898.)

No. 687.

1. COLLISION—STEAMERS IN RIVER—VIOLATION OF NAVIGATION RULES.
   Two steamers, one ascending and the other descending along the left bank of a broad, straight stretch of the Mississippi river, *held* both in fault for a collision between them,—the descending vessel for faulty construction, rendering it difficult to check her speed, and for being out of her proper course, in the path of ascending vessels; the ascending vessel for starboarding her helm instead of porting, as required by navigation rules 18 and 19 (Rev. St. § 4233).

2. SAME—MUTUAL FAULT—DAMAGES—LOSSES OF CREW.
   In case of mutual fault, members of the crew of one vessel, who lose personal effects, may recover from the other only half their damages.

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3. SAME—PASSENGERS.

In cases of mutual fault, the personal representatives of passengers lost with one of the vessels may recover full damages from the other, but the latter may recoup one-half thereof from the half damages awarded to the owners of the former vessel.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

This cause arises from a collision on the night of January 27, 1897, between the steam yacht Argo, 101 feet long, 6 feet draft, and the Norwegian steamer Albert Dumois, a freight vessel, 210 feet long, and 17 feet draft, in a straight stretch of the Mississippi river, half a mile wide, and about 80 miles below the city of New Orleans. The Argo was under special charter of a newspaper company to make a quick trip to the mouth of the Mississippi river and return. She started about 7 o'clock p. m. on that day, and had on board at the time a master, who served also as a pilot; an engineer; a fireman; one deckhand; one steward, who served also as a cook. The undertaking was under the direction of H. G. Hester, representative of the newspaper company; and his party consisted of himself, A. Faure Bourgeois de Blesine, A. C. Lindauer, newspaper correspondents, and one Cranz, an invited guest. According to her inspection certificate, the Argo should have had one pilot, one engineer, and a crew of five men; but as there was great hurry to get her away, so as to be present at the mouth of the river at the time of the arrival of a congressional committee to inspect the jetties (which had preceded them on the steamship Whitney), to report said committee's proceedings, Messrs. Hester, Lindauer, and Blesine, all of whom were said to be familiar with the management of water craft, agreed in case of necessity to lend a hand and act as part of the crew. The Argo sped rapidly down the river, without delay or accident, until, between 12 and 1 o'clock in the morning of January 28, 1897, she came in collision with the Albert Dumois, striking her on the starboard bow 10 or 12 feet abaft the stem, damaging herself so badly that she sunk in a few minutes thereafter; her crew and passengers all escaping, except Hester and Blesine, who were drowned. The Dumois made a search of an hour or more, trying to find the missing men, and then brought the remainder of the crew and passengers to the city of New Orleans. On the same day the Dumois reached New Orleans, Oscar M. Springer, owner of the Argo, filed his libel in rem against the Dumois, claiming that she was entirely in fault, asking $40,000 damages. Shortly thereafter the crew of the Argo filed their intervention, claiming various small sums, to the value of their personal effects lost by the sinking of the Argo; and thereafter Mrs. Blesine, mother of the deceased Blesine, filed her libel in personam against Anders Jakobsen, who had appeared, through the steamship's master, and claimed to be the sole owner of said steamship; alleging that said Blesine died without issue, having no wife or father living, leaving her his only surviving parent, and alleging said collision and death were solely caused through the fault, negligence, and improper conduct of those in charge of the steamship, and asking for $20,000 damages. After filing his claim, Jakobsen, owner of the Dumois, filed a petition claiming the benefit of the limited liability act, and asked that the said vessel and her pending freight be appraised and released on bond. Thereupon an appraisal was had, and the value of the vessel and freight appraised at $31,333.75, and an order was rendered restraining further proceedings against said vessel; and a monition was published for three months, calling on all parties having or pretending to have claims against the said vessel to appear before a commissioner and present the same. Under this monition, Mrs. Hester, the widow of H. G. Hester, filed her petition, alleging that her said husband had lost his life through the fault of those in charge of the said Dumois, and claiming damages in the sum of $20,000. By agreement the libel of Mrs. Blesine was filed as a claim under said monition, and to be treated as an answer to the petition of Jakobsen, denying fault on the part of the Dumois, and asking that all claims be made against said bond, and not against the steamship. The libelant Springer filed an answer denying all the allegations, and surrendering the wreck of said Argo, and any charter money that might be due to him and to any and all parties in

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interest. On the hearing the district court decided that the Dumois was solely in fault, and rendered decrees against the fund in favor of Springer, owner of the Argo, for $11,000; Mrs. Hester, $5,000; Mrs. Blesine, $2,500,—and for the crew of the Argo the following amounts: One Broadhurst, $51.45; Orkney, $20.25; Jewett, $25.50; Brown, $213; Green, $5; and Diseamus, $4. From this decree the owners of the Dumois appealed, claiming, among other errors, that the court erred in finding the Dumois in fault, and in not finding the Argo solely in fault; and thereupon O. M. Springer, the owner of the Argo, also appealed, claiming that the court erred in not finding a higher value than $11,000 for the Argo.

Richard De Gray, for Springer, Mrs. Blesine, and crew.
George Denegre, for Mrs. Hester.
John D. Rouse and William Grant, for claimant Jakobsen.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PARDEE, Circuit Judge (after stating the facts). Prima facie, a collision between an ascending and a descending steamer, in a straight stretch of the Mississippi river, where it is half a mile wide, can only result from gross mismanagement in the handling of both steamers, unless there is intended and carried out a deliberate purpose on the part of the one to run the other down. In case each vessel is anywhere near its proper place, they are necessarily too far apart to make a collision possible. The case in hand is no exception to the rule. It is admitted by the pleadings and shown by the evidence that at the time the Dumois and the Argo first came in sight of each other the Dumois was ascending the river in her proper place, near the left bank. That the Argo was at the same time descending the river near the same bank, and out of her proper place, which was the middle of the river, is clear, by the preponderance of the evidence, supported as it is by conclusions that necessarily follow from admitted facts. Lombard, the pilot of the Dumois, who was keeping a lookout on the bridge, and Sibitsen, the mate, who was with him, also, on watch, each testify that when he first distinguished the Argo he saw her red, green, and white lights dead ahead,—if anything, a little inside; that is, a little nearer the left bank than the Dumois. Larsen, able seaman, who was on watch, and afterwards at the wheel of the Dumois, says that the Dumois was about a half a ship's length from the left bank when he saw the lights of the Argo to the starboard of the Dumois, and this was after some signals had been exchanged. Nicholas Theodore, pilot on the tug Day Dream, which, with its tow, was about to land at the lugger landing on the left bank, just above where the collision took place, says that the Argo passed so close to him that he could see her color; that she was about 50 feet from him, and he was afraid she would run into him. E. R. Green, cook on board the Argo, says that when he heard the first whistle of the Argo he went up on the steps and looked out, and saw all the three lights of the Dumois. Capt. Brown, master and pilot of the Argo, and who was the only man on watch at the time, although Diseamus, seaman, stood by him, admits passing the tug Day Dream and giving her a signal of passage, and immediately after admits first seeing the Dumois, but only the white and red lights of that vessel,

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which he says were on his port bow. Diseamus saw only the lights that Capt. Brown saw. One Nicholas Dedes, pilot of the tug Day Dream, says that they were about making a landing on the east bank of the river when the Argo passed, blowing one whistle. He does not undertake to say where the Argo was when she first signaled the Dumois. One Capt. Jurisch, on one of the luggers in tow by the Day Dream, testifies to the signal between the Argo and the Day Dream, but gives no satisfactory evidence as to where the Argo was at the time she first came in sight of the Dumois. From this evidence, and from legitimate conclusions from admitted facts, it is clear that at the time the Argo first sighted the Dumois the Argo was out of her proper course, unnecessarily, in the path of ascending vessels. This fact being established, it is very easy to reconcile the other evidence, conflicting though it may be, as to the lights, course, and management of the respective ships, resulting in the collision. The master of the Argo admits that after sighting the Dumois, and before changing his course, he waited for the Dumois to give the passing signal, and that, the Dumois not giving the passing signal, he himself gave it,—one whistle, meaning to pass to the right,—and thereupon, or very soon thereafter, put his helm to port. Notwithstanding the cross signal of two whistles then given by the Dumois, and the apparent direct change of course of the Dumois in accordance with its signal, and the continuance of the Dumois upon its changed course, the master of the Argo, believing in the speed of his vessel, and that he could run around and pass to the right of the Dumois in any event, kept his course until he struck the Dumois and sunk his vessel. We quote from his deposition:

"Q. Well, how far away was the boat when you first saw her, before you gave the signal? A. She was about three-quarters of a mile away, I guess; about three-quarters of a mile, the way I was going. I understand it now; yes, sir; I saw her some time before I blew the first whistle. Q. You understand, of course, which vessel should blow first? A. It was her place to blow first. That is what I was waiting for. Q. And when she didn't blow—A. I blew. Q. You blew because she didn't blow for you first? A. Exactly. * * * Q. Did you blow for the Dumois after you passed abreast of the luggers at the canal? A. Yes, sir; I blew, but I waited some time for him to blow, and he didn't blow. Then I blew one whistle as he was on the east shore. Q. After you passed the Day Dream and her luggers when you blew the whistle first? A. I suppose I was not more than about—very little distance—about five or six seconds, seven or eight seconds. * * * Q. Why didn't you blow the signals of alarm when you first discovered the lights of the Dumois? A. Because I had no business blowing the alarm then, because I was on my right course; and I blew one whistle to him, and he answered by two, crossing my signal, which I suppose any man would have altered his signals and stopped his ship, coming that close to each other. Q. You didn't sound that one blast of the whistle until you had passed the Day Dream, when you were less than half a mile from the Dumois? A. No, sir. Q. When did you sound it? A. I sounded the whistle half a mile from the Dumois; that is, the first whistle. I was going very fast, captain. Q. You understand the rule to be, then, that, when an ascending vessel gives the signal for sides, that the descending vessel may give her signal for sides? A. Yes, sir; I was waiting for him to do it, and I thought I would have to do it; couldn't wait any longer; and so I blew one whistle, and he answered me back two whistles, crossing my signal. Then I blew one immediately afterwards,—one whistle,—then immediately afterwards, and ported my helm quick, when he blew his two whis-

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tles. Instead of blowing his two whistles, he ought to have stopped according to the rules, and backed his ship. I ported my helm right away, to get out of the road, immediately after the two whistles were blown by him. Q. What interval of time elapsed between your first and second whistle? A. I suppose it was not very long. Let us see; about—not more than about 15 seconds. Q. Then you put your helm hard a-port? A. I put my wheel hard a-port, and, the velocity I was going, I made sure I would go clear of him. That any sane man would go across my bow, I thought it was too much altogether. I have been on this river 40 years, and I never knew anybody to do like that. Q. Why didn't you stop and back after you saw the Dumois crossing your signal? A. It was too late then. I thought I could clear her. Q. It was not too late to port your helm? A. I ported my helm after I blew the second whistle. She never blew any more whistles. Q. Why didn't you stop after you blew the second whistle? A. Because my judgment said I could clear her, with the velocity I was going. Q. That is the reason you never attempted to reverse,—check your speed? A. No, sir; I made sure I would clear her. That is the reason. You could see yourself when I struck her eight feet from the stem. If that ship was backing when they rung the alarm, I would have cleared her two or three hundred feet."

The fault of the Argo is too clear to require further discussion, and it is hardly necessary to add that at the time she was short of her regulation crew. The substitution of passengers to work in case of necessity may satisfy inspection officers, but ought not to deceive the court. She was not constructed so that her speed could be checked when required by the rules of navigation, or that she could be backed within any reasonable time after sighting danger; and, withal, she was running recklessly in the nighttime, with substantially only one man on watch, in the path of ascending vessels, trusting to her speed and management to keep out of trouble.

The fault of the Dumois is not so apparent. She was properly officered, manned, and equipped; had a regular licensed pilot on board; carried the regulation lights; was in a place where she had a right to be at the time the Argo was sighted. Ahead of her, almost within hailing or signaling distance, the tug Day Dream was either landing, or had just landed, showing all the lights of such a tow. In addition, coming towards her, showing three lights at an even height (the red, green, and white lights), was the Argo. From the evidence, the Argo signaled first to pass to the right, and ported her helm accordingly. The Dumois, either not hearing this signal, or not willing to permit the Argo to pass to the right, crossed the Argo's signal, and gave two whistles to pass to the left, and apparently immediately put her helm to starboard, changing the course of the vessel from straight up the river along the left bank to across the river, or towards the right bank. Notwithstanding the failure of the Argo to answer with two whistles, the Dumois kept her course, and only stopped and reversed her engines when the collision was apparently inevitable. Rules 18 and 19 (section 4233, Rev. St.) are as follows:

"Rule 18. If two vessels under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other. Rule 19. If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other."

According to these rules, the Dumois, instead of insisting on keeping her course, should have ported her helm, and she would have

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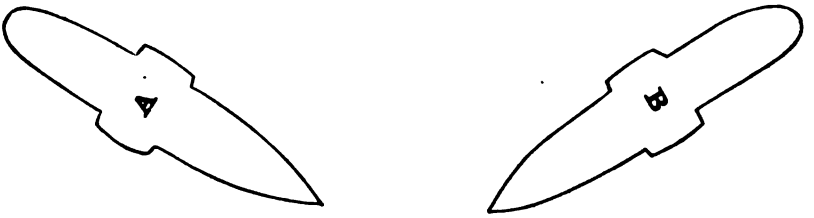
avoided the collision. As soon as the Argo ported her helm, and showed only her red light to the Dumois, and the Dumois had starboarded her helm, showing only the green light to the Argo, the vessels were in the fifth position foreseen and provided for by the rules of the supervising inspectors, to wit:

"This is a situation requiring great caution; the red light of A. in view to B. and the green light of B. in view to A. will inform both that they are approaching each other in an oblique direction. B. should put his helm to port and pass astern of A., while A. should continue on his course or port his helm, if necessary to avoid collision, each having previously given one blast of the steam whistle, as required by the rules when passing to the right."



And the Dumois should have put her helm to port, to pass astern of the Argo.

As to the value of the Argo, we have examined all the evidence. She had had a varied and interesting career, and at different times unquestionably had different values. The district court allowed $11,000 as her value, probably based upon the testimony of Col. Miller, who testifies that he had had some claim against the owner, and some correspondence with him as to the value of the Argo. In November or December, 1896, the owner expressed himself as willing to sell the Argo for $12,000, but claimed that it would be a tremendous sacrifice, and that whoever bought her at that price would be getting a bargain. He was anxious to sell, and would allow one or two thousand dollars commission. The owner himself testifies that the day previous to the collision he had sold a half interest in her for $7,500, and that the sale was not concluded only because the Argo was sunk; and this evidence is corroborated by one Bagley, the intending purchaser. There seems to be no dispute as to this fact in regard to the value of the Argo, and giving effect to the same, and further considering the general average of the values of the Argo fixed by the witnesses, we find that the value of the Argo at the time of the collision was $15,000.

The assignments of error not relating to the fault of the vessels nor to the value of the Argo are not well taken.

Hester and Blesine were passengers aboard the Argo. The claim that they were part of the crew of the Argo is not sustained by the evidence.

Finding as we do both the Dumois and Argo in fault, the decree of the district court must be reversed, and a new decree, adjusting the damages, entered. The crew of the Argo who lost effects by the collision are entitled to recover only half their damages from the Dumois, and, as the Argo was in fault, nothing from their own ship.

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The Queen, 40 Fed. 694; The City of Norwalk, 55 Fed. 102. Hester and Blesine being passengers on board the Argo, and not in fault, their representatives are entitled to recover full damages from the Dumois; but the Dumois is entitled to recoup half the damages so paid, and deduct the same from the amount awarded to the owners of the Argo. The Hercules, 20 Fed. 205; The North Star, 106 U. S. 17, 1 Sup. Ct. 41. The Argo, being a total loss, can recover one-half her value from the Dumois, less one-half the damages suffered by the Dumois, shown by the record to be $185. Decreed accordingly.

(87 Fed. 789.)

CLARK et al. v. McGHEE et al.

(Circuit Court of Appeals, Fifth Circuit. May 3, 1898.)

No. 680.

1. APPEALS—FROM INTERLOCUTORY ORDERS—FINAL DISPOSITION—REMANDING.
   On an appeal from an interlocutory order the court has power to hear the whole case, and to make final disposition of it; but where the record is insufficient or incomplete, the court will only consider whether the interlocutory order was providently granted.
2. TAXES—PROPERTY IN COURT'S CUSTODY—ACTION STAYED.
   A court whose receiver is in charge of a railroad may properly allow an injunction pendente lite forbidding the state taxing officers to collect disputed taxes levied against a part of the railroad property.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

Wm. J. Wood, for appellants.
Milton Humes, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

McCORMICK, Circuit Judge. The Memphis & Charleston Railroad Company owns a railroad with about 160 miles of main track and 17 miles of side track in the state of Alabama. Its property in Alabama is in the hands of receivers appointed by the circuit court for the Northern district of Alabama. On the 12th of April, 1897, these receivers, C. M. McGhee and Henry Fink, exhibited their bill to the judge of that court, by which they were appointed, complaining therein of J. O. Clark, as tax assessor of Colbert county, and of M. Malone, as tax assessor of Lauderdale county, in that state. In their bill they show, in substance, that the property of the railroad which by law is made returnable to the state auditor includes a bridge about one-half mile long on the Florence branch of the railroad, which bridge crosses the Tennessee river at the town of Florence, and is partly in each of the counties for which the defendants are assessors of taxes; that by law the receivers were required to return to the auditor the total length of the railroad in the state of Alabama, including the right of way, roadbed, side tracks, and main track in the state, and specifying the total length in the state and in each county, city, and incorporated

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town thereof, and also of the number of locomotive engines, and passenger, freight, platform, construction, and other cars of said company, and of the average amount and value of merchandise and supplies kept or carried on trains for sale or other disposition for a profit by the company to employés or other persons; that the valuation of the property of railroad companies for taxation is required in Alabama to be made upon the same principles as the valuation of every other species of property,—that is to say, the valuation of such property shall be had exclusively upon the consideration of what a clear, fee-simple title thereto would sell for under the conditions under which that character of property is most usually sold; that the railroad property in the custody of the receivers has been thus returned by the receivers, and valued and assessed by the state board of assessment from time to time as required by law, and the taxes so assessed have been fully paid as required by law; that the Florence bridge is so constructed that it can be used, and it has been and is being used, as a thoroughfare over which persons, animals, and vehicles other than railroad cars pass and repass, paying a regular toll therefor; that all of the substructure of the bridge—that which supports the thoroughfare superstructure and that which supports the superstructure for the passage of trains—is identical and is necessary for the support and maintenance of the bridge as a railroad bridge; that the thoroughfare feature is a mere incident to the whole structure, the chief office, purpose, and use of the bridge being for the passage of trains of the Memphis & Charleston Railroad and of such other railroads as by contract pass their trains over the same; that for more than ten years the owners of the Memphis & Charleston Railroad have made their returns to the state auditor as required by the law now in force, and they have duly paid their taxes assessed thereon, and have made no other return of the Florence bridge than such as is embraced in the return of its property, as above set out, to the auditor for assessment by the state board of assessment; that the defendants have undertaken to assess as property escaped from taxation for the five years last past, including the year 1892, that portion of said Florence bridge which the assessors have undertaken by their assessment to separate and segregate from the other portion of the bridge, namely, the thoroughfare portion thereof, making for the portion in Lauderdale county for the five years an aggregate valuation of $450,000, and on that portion in Colbert county, for the same period, an aggregate valuation of $337,500, or $787,500 altogether, and have notified the receivers that it is the purpose of the defendants to take steps immediately to enforce the collection of the tax so assessed. The receivers allege that the entire tax on the property of the Memphis & Charleston Railroad Company due and owing to the state of Alabama, and each and every county and municipality thereof, has heretofore been fully paid and discharged, and that said assessment is unlawful and unauthorized by law, and its enforcement, as they are advised, should be perpetually enjoined by the court. In accordance with the prayer, the circuit court granted a restraining order, which subsequently was continued in force until the further order of the court, and the motion of the defendants to dissolve the same was refused at a later day, from

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which orders of the court this appeal is taken. The motion to dissolve the restraining order presents seven grounds on which the dissolution was asked, going to the merits of the whole case.

The assignment of errors is, in substance, that the court erred in overruling all and each of these grounds of the motion to dissolve the restraining order. The counsel for each of the parties, respectively, have submitted printed briefs and oral argument addressed to the merits of the whole case, as though the appeal was from a decree passed on the final hearing. It is settled that in such a case as this we have jurisdiction on this appeal from an interlocutory order to consider the whole case as the counsel have presented it, and doubtless it is the wish of both parties that the decision now should dispose of the case. But, after a careful examination of the record brought up, with all of the provisions of the statutes of Alabama which appear to us to bear on the subject, we do not feel that we are required or fully prepared now to make such final disposition of the issues presented, and we prefer to consider only whether on the bill and the answer and exhibits the circuit court acted improvidently in granting and refusing to dissolve the restraining order. The property being in the custody of the court, any charge upon it, even for taxes, could only be enforced against it through the orders of the court; and upon the coming in of this bill the judge of the court might very well insist that the hands of the executive officers should be stayed until the issue between them and the receivers as to its liability to the charge sought to be fastened on it could be passed upon by the court in the regular course of proceeding for the final hearing of such issue.

There is evidently a substantial issue between the receivers and the assessors. The bridge is certainly not an ordinary toll bridge, owned and operated by a toll-bridge company. It is certainly a very substantial and necessary railroad bridge, owned and operated by a railroad company, and it constitutes nearly a half mile of the length of its track in the state of Alabama. The railroad company, under an express grant of power, heretofore acquired, and is still exercising, the franchise of a toll-bridge company at that place, and the bridge in question is so constructed as to enable the railroad company, as the owner of the franchise for the toll bridge, to discharge its duty to the public, and to get a revenue therefrom. It would seem, therefore, that there is a property here not necessary to the operation of the railroad, or necessarily included in the returns made to the state auditor. But what part of this bridge is a toll bridge? Not the whole of it necessarily, because the railroad bridge must have a substructure, and there is but one substructure to the two-story superstructure. This inherent union of elements not only attaches to the structure as it stands, but it also attaches equally to the matter of its maintenance. There is a provision in the tax laws of Alabama which, having before us only its letter, and having no exemplification, by testimony or otherwise, of its practical application, we find it difficult to construe. It is under the subtitle "Other subjects of taxation and rates thereon," and reads thus: "(3) On the gross incomes of all gas works, electric light companies, telephone companies, street railways, toll bridges and ferries, and also all canals, ditches,

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channels, passes, tramroads and pole-roads used for transporting timber or other valuable commodities of commerce, at the rate that property is taxed." Code Ala. 1896, § 3912, subd. 3. We think the final disposition of the questions here presented requires an ampler record than we have before us, and therefore we affirm the action of the circuit court in refusing to dissolve the restraining order on the grounds presented, and remand the cause to be proceeded with to a final hearing according to the practice in such cases.

(87 Fed. 792.)

BOSTON & M. R. R. v. WADE.

(Circuit Court of Appeals, First Circuit. May 11, 1898.)

No. 217.

GARNISHMENT—DESCRIPTION OF DEFENDANT.

Defendant was summoned to answer touching its indebtedness to "the Central Vermont Railroad Company, a corporation established under the laws of the state of Vermont, and doing business under the name of the Ogdensburg Transit Company," and answered that it had no funds belonging to the defendant described, but that it had funds of the Central Vermont Railroad Company, and that the Ogdensburg Transit Company was an independent corporation. *Held*, that the defendant was properly charged as trustee.

In Error to the Circuit Court of the United States for the District of Massachusetts.

This is a writ of error brought by the Boston & Maine Railroad upon a judgment of the circuit court against the Central Vermont Railroad Company as principal defendant, whereby execution for the amount of the judgment was awarded as well against the goods, effects, and credits of the defendant in the possession of the Boston & Maine Railroad, as trustee.

A writ was served upon the Boston & Maine Railroad, in which writ "the Central Vermont Railroad Company, a corporation established under the laws of the state of Vermont, and doing business under the name of the Ogdensburg Transit Company," was described as defendant, and the Boston & Maine Railroad was summoned as trustee of the defendant. The Boston & Maine Railroad filed in the superior court an answer of "no funds"; and subsequently the cause was removed by the Central Vermont Railroad Company, describing itself as defendant, to the United States circuit court for this district. The plaintiff then filed interrogatories to the Boston & Maine Railroad, inquiring as to what property of the Central Vermont Railroad was in its hands at the date of the service of the writ, which the Boston & Maine Railroad declined to answer, alleging that the property of the Central Vermont Railroad Company was not attached. Thereupon plaintiff moved for a default for failure to answer his interrogatories, and the court below ordered that the Boston & Maine Railroad answer said interrogatories. The Boston & Maine Railroad then answered, disclosing funds in its hands belonging to the Central Vermont Railroad Company. By subsequent proceedings, the court below entered judgment against said Central Vermont Railroad, and against the Boston & Maine Railroad as trustee. The trustee's contention is that no attachment under the writ was directed or made of property in the hands of the trustee belonging to the Central Vermont Railroad, but that the writ directed only an attachment of the property of the Ogdensburg Transit Company (alleged to be an independent cor-

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poration) in the hands of the Boston & Maine Railroad, or of the Central Vermont Railroad, doing business under the name of the Ogdensburg Transit Company, in the hands of the Boston & Maine Railroad, and that, as the answers of the Boston & Maine Railroad disclose that it had no property of either in its possession at that time, no judgment against it could properly be entered.

Sigourney Butler, for plaintiff in error.

Robert M. Morse and Wm. M. Richardson, for defendant in error.

Before COLT, Circuit Judge, and WEBB and BROWN, District Judges.

PER CURIAM. The appellant's admission of the possession of funds belonging to the Central Vermont Railroad Company was a sufficient basis for the action of the circuit court in charging the appellant as trustee. The defendant described in the original writ was "the Central Vermont Railroad Company, a corporation established under the laws of the state of Vermont." The addition to this description of the words "and doing business under the name of the Ogdensburg Transit Company" cannot be regarded as sufficient to mislead the appellant as to the identity of the defendant, or to give rise to any substantial doubt that the Central Vermont Railroad Company was the sole defendant named in the writ. The judgment of the circuit court is affirmed, with the costs of this court to the appellee.

(87 Fed. 961.)

THE ANNIE FAXON.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1898.)

No. 414.

CIRCUIT COURT OF APPEALS—JURISDICTION.

The circuit court of appeals has no jurisdiction of an appeal in proceedings in admiralty for limitation of liability, when the only question presented for review on the record is whether the district court had power and jurisdiction, after final disposition of the questions of limitation, to enter a decree in personam against the owners of the vessel for damages suffered by some of the interveners.

Appeal from the District Court of the United States for the Southern Division of the District of Washington.

Cox, Cotton, Teal & Minor, for appellants.

Charles H. Taylor and Hubbard & Taylor, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This was a petition by the Oregon Railway & Navigation Company, as owner, and the Oregon Short Line & Utah Northern Railway Company, lessee, for limitation of liability in respect to the damages caused by the explosion of the boiler of the steamer Annie Faxon on August 14, 1893, while the vessel was navigating the Snake river, in the state of Washington.

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The steamer was owned by the Oregon Railway & Navigation Company, but at the time of the accident it was leased to, and was being operated by, the Oregon Short Line & Utah Northern Railway Company. On September 18, 1893, both of these companies filed their joint and separate libels and petition in the district court for the district of Washington, in accordance with the provisions of the fifty-fourth admiralty rule, for the purpose of obtaining a limitation of their liability under section 4283 of the Revised Statutes of the United States, and such proceedings were thereupon had that an appraisement of the wreck was had, fixing its value at $3,520, and a bond in the sum of $4,020, in lieu of the appraised value, was made and given by the appellants. Thereafter various persons who were passengers upon said steamer, and injured by the explosion, and representatives of deceased passengers killed by the explosion, as well as various persons who were employés upon the steamer, injured by the explosion, and representatives of deceased employés, killed by the explosion, appeared in the proceedings, and presented and filed their claims for damages, and also made and filed separate answers in the nature of cross bills, contesting the right of the appellants to an exemption from or a limitation of their liability in the premises. Among the claims so filed, and for which judgments were asked against the appellants, and each and both of them, were the following for and on behalf of the appellees: Lewis T. Lawton, a passenger, $176,000; Mary A. McIntosh, as administratrix of the estate of John McIntosh, deceased, a passenger, $50,000; and Susan McIntosh, as widow and sole heir at law of Thomas McIntosh, deceased, a passenger, $50,000. The district court held that the appellants were entitled to limit their liability with respect to the claims of all the persons injured, and a decree was entered accordingly. From this decree an appeal was taken to this court, and this court held that the appellants were entitled to have their liability limited for damages resulting from the explosion with respect to the claims of the employés, but were not entitled to have their liability so limited with respect to the claims of passengers. 21 C. C. A. 366, 75 Fed. 312. The decree was, therefore, reversed as to the claims of the appellees, and the cause was remanded for further proceedings in the court below, not in conflict with the opinion of this court. When the mandate of this court was entered in the district court, the appellees filed a petition praying that the fund in court be distributed, and a commissioner appointed to take testimony as to the damages suffered by the appellees. Testimony was accordingly taken as to such damages, and an order was made, distributing the fund in court to the various claimants, including a portion of it to the appellees. The court then proceeded and ascertained the amount of damages suffered by the appellees, and entered a personal judgment against the Oregon Short Line & Utah Northern Railway Company, for such damages in favor of the claimants as follows: Lewis T. Lawton, $20,000; Mary A. McIntosh, as administratrix of the estate of John McIntosh, deceased, $10,000; and Susan McIntosh, as widow and sole heir at law of Thomas McIntosh, de-

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ceased, $10,000. From this judgment the appellants have prosecuted the present appeal.

The errors assigned—six in number—may be reduced to the following: First. The district court erred in making the order appointing a commissioner to take evidence as to the damages claimed to have been sustained by the appellees, for the reason that the district court had no power, under the mandate of the circuit court of appeals, or under the practice in such proceedings, to enter a personal judgment or decree against the appellants in excess of the limited liability fund in the district court represented by the bond taken in that behalf. Second. The district court erred in depriving the appellants of a trial by jury as to the claims of the appellees in excess of the limited liability fund in the district court. Third. The district court erred in entering a personal judgment against the Oregon Short Line & Utah Northern Railway Company in favor of the appellees. Fourth. The district court erred in entertaining jurisdiction of the proceedings for the purpose of ascertaining the liability of the appellants, or either of them, in excess of the fund represented by the bond given by the appellants. It is contended on the part of the appellants that the only decree which could have been entered in the court below upon the mandate of this court was one dismissing the injunction restraining the appellees from pursuing appropriate remedies to collect from the appellants the damages claimed to have been suffered by the appellees, and that the district court had no power to retain jurisdiction of the proceedings for the purpose of entering a judgment against the appellants, or either of them, for damages.

It appears that before the taking of the testimony in the case it was stipulated that no action or appearance on the part of the appellants should be taken or held as a waiver of any objection to the jurisdiction of the court, or to the jurisdiction of the court to enter up any judgment or decree assessing damages in favor of the appellees, or either of them; that, upon the commissioner of the court proceeding to take testimony, the appellants appeared specially, and reserved the right to make any and all objections to the jurisdiction of the court to further try, hear, and determine any matter whatsoever in the proceedings, or to the jurisdiction of the court to render any judgment or decree therein, assessing damages in favor of the appellees; that no other objection or exception whatever to any testimony, evidence, ruling, direction, or proceeding was made, taken, or suggested, and no error of law noted or excepted to, or called to the attention of the district court by the appellants, or either of them, in the proceedings or at the trial; and that neither of the appellants, by their attorneys or otherwise, made any request, application, or motion for a jury trial in the district court. The only question contained in the record on the present appeal is, therefore, the question of the jurisdiction of the district court to hear and determine the issues as to the liability of the appellants for the damages sustained by the appellees, and to enter a judgment against the Oregon Short Line & Utah Northern Railway Company and in favor of the appellees in excess of the fund in the district court rep-

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resented by the bond given by the appellants. The act of March 3, 1891 (26 Stat. 826), creating the circuit court of appeals, provides in section 5 of the act:

"That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court in the following cases: In any case in which the jurisdiction of the court is in issue in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision. * * *

"Sec. 6. That the circuit court of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law."

In McLish v. Roff, 141 U. S. 661, 668, 12 Sup. Ct. 118, 120, the supreme court held that, after a final judgment in the circuit court, "the party against whom it is rendered must elect whether he will take his writ of error or appeal to the supreme court upon the question of jurisdiction alone, or to the circuit court of appeals upon the whole of the case. If the latter, then the circuit court of appeals may, if it deem proper, certify the question of jurisdiction to this court."

In the case of The Alliance, 44 U. S. App. 52, 17 C. C. A. 124, and 70 Fed. 273, this court held that, to give the circuit court of appeals jurisdiction to review an appeal from the district court in admiralty under the act of March 3, 1891, it was necessary to present for review some question other than that of jurisdiction, and, as the case did not present such a question, the appeal was dismissed.

In Manufacturing Co. v. Barber, 18 U. S. App. 476, 9 C. C. A. 79, and 60 Fed. 465, the circuit court of appeals for the Seventh judicial circuit held the same doctrine upon a writ of error from the circuit court, and in that case the writ of error was dismissed. In the present case the substantial and only question is as to the power of the district court to render a personal judgment or decree against the company having the custody, control, and management of the steamer at the time of the accident. This is clearly a question of jurisdiction, which this court is not authorized to review. The appeal is therefore dismissed, at appellants' costs.

(87 Fed. 964.)

SMITH v. RACKLIFFE.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1898.)

No. 422.

1. JURISDICTION OF FEDERAL COURTS—ACTION AGAINST STATE OFFICER.
   An action by a citizen of another state or by an alien against a state treasurer to recover taxes alleged to have been illegally collected by the state is, in effect, an action against the state, and cannot be maintained in a federal court in view of the prohibition of the eleventh amendment.[1]

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[1] As to federal jurisdiction in actions against state, see note to Tindall v. Wesley, 13 C. C. A. 165.

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2. SAME.

Pol. Code Cal. § 3669, which provides for bringing suits against the state to recover taxes illegally collected, is not to be construed as a consent that such suits may be brought in the federal courts, since it contains provisions wholly inapplicable to the procedure of the federal courts, among them being a provision that, at a certain stage of the case, the treasurer may cause it to be removed into the superior court for the county of Sacramento.

3. SAME—CITIZENSHIP—RECEIVERS OF CORPORATIONS.

It is only where the jurisdiction of the federal courts depends upon diverse citizenship that the citizenship of a receiver of an incorporated party is material. If the jurisdiction is asserted on any other ground, the receiver stands upon the same footing as the corporation itself.

4. SAME.

The provision in the constitution giving the federal courts jurisdiction of controversies "between a state and citizens of another state, * * * and between a state, or the citizens thereof, and foreign states, citizens or subjects" (article 3, § 2), does not include an action against a state by a corporation created by act of congress.[2]

Appeal from the Circuit Court of the United States for the Northern District of California.

C. N. Sterry and E. S. Pillsbury, for plaintiff in error.

W. F. Fitzgerald and W. H. Anderson, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The plaintiff in error, as receiver for the Atlantic & Pacific Railroad Company, was the plaintiff in an action which was brought against the state treasurer of the state of California, under section 3669 of the Political Code of California, to recover $2,272.80 taxes paid by said company for the year 1893, alleging, in his complaint, that said railroad company was operating, under a lease from the Southern Pacific Railroad Company, a certain line of railroad in the state of California, over which leased line the lessor company also ran its trains; that said line of road, and the rolling stock thereon, owned and operated by the Southern Pacific Railroad Company, were returned by that company to the state board of equalization for assessment for the year 1893, and were assessed to said Southern Pacific Company at a certain apportioned valuation per mile for all of the road which is covered by the lease; that the rolling stock on said leased road, owned and operated by the Atlantic & Pacific Railroad Company, was returned under protest by that company to the state board of equalization, and was by said board assessed for the year 1893 to its said owner; that each of said companies paid the taxes levied upon its property; that the said rolling stock of the Atlantic & Pacific Railroad Company so assessed was not used alone upon the line of the leased road in California, but was used in said company's traffic in other states, and was constantly coming and going into and out of said state, and that the Atlantic & Pacific Railroad Company's headquarters and the situs of its rolling stock is

[2] As to diverse citizenship as ground of federal jurisdiction, see note to Shipp v. Williams, 10 C. C. A. 249, and supplementary note to Mason v. Dullagham, 27 C. C. A. 298.

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in the county of Bernallio, N. M., in which county all of its rolling stock was returned for taxation in 1893; that said assessment on the rolling stock of both companies using said road resulted in double taxation. The action was begun in the name of J. W. Reinhart, the former receiver of said road, and against J. R. McDonald, then the state treasurer. To the said complaint a demurrer was interposed, upon the grounds—First, that the court had no jurisdiction of the subject-matter of the action; and, second, that the complaint failed to state facts sufficient to constitute a cause of action. The circuit court, McKenna, J., sustained the demurrer upon the second ground, but disposed of the question of the jurisdiction in the following language:

"The view that this is a suit against the state is presented by the attorney general with great strength and plausibility. But, even if the contention be true, I think it is a fair deduction from the authorities, as from principle, that, the right of suit against the treasurer of the state being given, it may be brought in the federal courts when other grounds of jurisdiction exist, as they do in this case. I do not think it is necessary to review the cases. They are very numerous, and the care of counsel has cited all of them." Reinhart v. McDonald, 76 Fed. 403.

Upon writ of error from this court, the plaintiff in error contends that the circuit court erroneously sustained the demurrer, and the defendant in error again raises the objection which was presented in the lower court, that the court is without jurisdiction of the subject-matter of the action upon the ground that it is an action against the state of California, and subject to the inhibition of the eleventh amendment to the constitution of the United States, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." There can be no doubt that the action, although nominally against the state treasurer, is in fact an action against the state of California. From the time of the adoption of the eleventh amendment the supreme court of the United States has held that it should be construed fairly and liberally, and in consonance with its manifest purpose, and has established the doctrine that when, "the nominal defendants have no personal interest in the subject-matter of the suit, but defend only as representing the state, the state is the real party against whom the relief is sought, and this suit is substantially within the prohibition of the eleventh amendment." Hagood v. Southern, 117 U. S. 52, 6 Sup. Ct. 608; Louisiana v. Jumel, 107 U. S. 711, 2 Sup. Ct. 128; In re Ayers, 123 U. S. 443, 8 Sup. Ct. 164; Louisiana v. Steele, 134 U. S. 230, 10 Sup. Ct. 511. In re Ayers, 123 U. S. 443, 8 Sup. Ct. 164, Mr. Justice Matthews said, of the purpose of the eleventh amendment:

"It was thought to be neither becoming nor convenient that the several states of the Union invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other states or aliens, or that the course of their public policy and administration of their public affairs should be subject to, and controlled by, the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guarantied

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by the eleventh amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as to effectually accomplish the substance of its purpose. In this spirit, it must be held to cover, not only suits brought against a state by name, but those also against its officers, agents, and representatives, where the state, though not named as such, is, nevertheless, the only real party against which alone, in fact, the relief is asked, and against which the judgment or decree effectively operates."

The present case comes clearly within the line of cases to which these words apply. It is a case in which the state of California is alone interested as defendant. No personal relief is sought as against the state treasurer, no act of his is brought in question, and no official misconduct is charged against him. So far as he is concerned, the action is purely impersonal. It was originally begun against McDonald, his predecessor in office. It is the aim of the action to recover from the state treasurer, in his official capacity only, money which has been paid to the state for taxes, and mingled with other funds of the state. The money which the treasurer receives as such is kept by him in the vaults of the state treasury. It is so required by subdivision 1 of section 452 of the Political Code. If a judgment were rendered for plaintiff in the action, the treasurer, upon the controller's warrant, would be required to repay the tax money out of taxes so illegally collected, and to pay the costs out of the general fund of the treasury. The money sued for was not originally paid to the treasurer. It did not pass through his hands, but came into the treasury through other officers. The state is the only party in interest.

But, notwithstanding the eleventh amendment, the state may, by an act of its legislature, permit itself to be sued, either in a federal court or in its own courts. It is contended by the plaintiff in error that such permission has been granted in the present case by the provisions of section 3669 of the Political Code of California, which reads as follows:

"Sec. 3669. Each corporation, person, or association assessed by the state board of equalization, must pay to the state treasurer upon the order of the controller, as other moneys are required to be paid into the treasury, the state and county, and city and county, taxes each year levied upon the property so assessed to it or him by said board. Any corporation, person, or association, dissatisfied with the assessment made by the board, upon the payment of the taxes due upon the assessment complained of, and the five per cent. added, if to be added, on or before the first Monday in February, and the filing of notice with the controller of an intention to begin an action, may, not later than the first Monday of February, bring an action against the state treasurer for the recovery of the amount of taxes and percentage so paid to the treasurer, or any part thereof, and in the complaint may allege any fact tending to show the illegality of the tax, or the assessment upon which the taxes are levied, in whole or in part. A copy of the complaint and of the summons must be served upon the treasurer within ten days after the complaint has been filed, and the treasurer has thirty days within which to demur or answer. At the time the treasurer demurs or answers he may demand that the action be tried in the superior court of the county of Sacramento. The attorney general must defend the action. The provisions of the Code of Civil Procedure relating to pleadings, proofs, trials, and appeals are applicable to the proceedings herein provided for. If the final judgment be against the treasurer, upon presentation of a certified copy of such judgment to the controller, he shall draw his warrant upon the state treasurer, who must pay to the plaintiff the amount of the taxes so declared to have been illegally collected, and the cost of such action, audited by the board of exam-

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iners, must be paid out of any money in the general fund of the treasury, which is hereby appropriated, and the controller may demand and receive from the county, or city and county, interested, the proportion of such costs, or may deduct such proportion from any money then or to become due to said county, or city and county. Such action must be begun on or before the first Monday in February of the year succeeding the year in which the taxes were levied, and a failure to begin such action is deemed a waiver of the rights of action."

By this statute the state of California has made a general provision whereby it consents to be sued in its own courts in actions of the nature of the case at bar. Has it consented to be sued in the federal court? The state has the unquestioned right to select the forum in which it shall be sued, to prescribe the manner in which the suit shall be conducted, and to impose upon the prosecution of the action any condition that may be deemed proper. It may even retract its permission to be sued after an action has been begun. Railroad Co. v. Alabama, 101 U. S. 832. Examining the section just quoted, it will be seen that conditions are imposed which are wholly incompatible with a consent to be sued in the United States courts. It is made a condition of the action that, at the time when the treasurer demurs or answers, he may demand that the case be tried in the superior court of the county of Sacramento. That condition is a valid one, and it conserves a substantial right to the state. It could not be complied with in an action in the United States court. No cause can be transferred from the United States circuit court for the Northern district of California to the superior court of the state of California for Sacramento county. Again, it is provided in the same section that "the provisions of the Code of Civil Procedure, relating to pleadings, proofs, trials and appeals are applicable to the proceedings herein provided for." Although practice in the federal courts conforms as nearly as may be to that of the state courts in actions at law, there are certain features in which their procedure is controlled by acts of congress, from which the federal courts are not at liberty to deviate in response to any provision of a state statute, and the clause of the language just quoted in reference to appeals could have no application whatever in a proceeding in the United States court. By this provision in regard to appeals, it was clearly the intention of the legislature to make the supreme court of the state of California the court of last resort to pass upon all questions which might arise in such an action. It was intended that the rights of litigants in such a suit should be subject to the construction which that court should finally adopt. That provision secures to the state the most substantial right which is conserved to it in the section just quoted, and presents an insurmountable obstacle to the prosecution of the action in a court of the United States.

But it is urged by the plaintiff in error that the Atlantic & Pacific Railroad Company is not a citizen of another state, nor a citizen or subject of a foreign state, but is a corporation created under an act of congress for the express purpose of acting as an agent for the federal government, and is therefore not among those from whom, by the terms of the 11th amendment, the power to sue a state is withheld. The receiver stands upon the footing of the corporation itself. If the corporation had the right to sue the state of California, the receiver undoubt-

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edly has succeeded to the right. It is only where the jurisdiction of the United States courts depends upon diverse citizenship that the citizenship of the receiver is to be regarded. New Orleans v. Gaines' Adm'r, 138 U. S. 595, 11 Sup. Ct. 428; American Nat. Bank v. National Benefit & Casualty Co., 70 Fed. 420; Brisenden v. Chamberlain, 53 Fed. 307. The effect of the eleventh amendment was to overrule the decision of the supreme court in the case of Chisholm v. Georgia, 2 Dall. 419, in which it had been said, under the terms of article 3 of the constitution, extending the judicial power of the United States to controversies between a state and the citizens of another state, that a state was subject to a suit by a citizen of another state. Said Mr. Justice Matthews in Re Ayers, above cited: "The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties." In Hans v. Louisiana, 134 U. S. 1, 10 Sup. Ct. 504, it was held that the purpose of the eleventh amendment was to recognize the sovereignty of the state, and to declare that the judicial power of the United States was never intended by the framers of the constitution to extend to suits by individuals against a state, and that the amendment should not be so construed as to inhibit only suits at the instance of the particular classes of citizens named therein, but that it applied as well to suits against a state by its own citizens. The jurisdiction of the court in that case was invoked upon the ground that a federal question was involved in the controversy. The principles announced in the decision are conclusive of the question which is now before us. But we find a further and complete answer to the contention of the plaintiff in error. The jurisdiction of the United States court in the present case is not invoked upon the ground that the controversy presents a case arising under the constitution or laws of the United States. Nor can jurisdiction be claimed upon the ground of the diverse citizenship of the parties, since, as we have seen, the state itself is a party. It must rest upon some other grant of jurisdiction. The only other grant under which it could be claimed is that which is contained in section 2 of article 3 of the constitution, declaring that the judicial power of the United States shall extend to controversies "between a state and citizens of another state, * * * and between a state or the citizens thereof and foreign states, citizens or subjects." The plaintiff in error must find in this provision his right to proceed in a federal court, and if the Atlantic & Pacific Railroad Company is not a citizen of a state, or a citizen or subject of a foreign state, the controversy is not among those of which jurisdiction is conferred upon the United States courts by the constitution. It follows that the circuit court erroneously entertained jurisdiction of the cause. For want of jurisdiction the judgment of dismissal is affirmed.

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(87 Fed. 970.)

SOUTHERN PAC. R. CO. v. GROECK et al.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1898.)

No. 398.

1. RAILROAD LAND GRANTS—WITHDRAWAL OF LANDS—PRE-EMPTION.
No valid pre-emption can be made of lands which have been withdrawn from settlement and sale by the officers of the land department; and even if the order of withdrawal is subsequently canceled, and a patent then issues, no title passes, for the acts of the settler were in violation of law, and void.

2. SAME—WITHDRAWAL BY OPERATION OF LAW.
The act of July 27, 1866, § 3, granting lands to aid in the construction of the Southern Pacific Railroad Company, of itself operated to withdraw from settlement the lands lying within the indemnity as well as the grant limits, from the date of filing of the map of the general route; and the secretary of the interior had no power to affect the grantee's rights, or to authorize a pre-emption settlement on the lands, by subsequently canceling his order withdrawing the lands from settlement.

3. SAME—FORFEITURE OF LAND GRANT—POWER OF SECRETARY OF INTERIOR.
Delay in constructing the road, beyond the time limited by law, gives the secretary of the interior no authority to reopen the lands to settlement by canceling his order of withdrawal. A forfeiture of the railroad grant can be declared by congress alone.

4. SAME—LACHES OF GRANTEE.
Where the granting act of itself operates to withdraw from settlement lands lying within the indemnity limits as well as within the grant limits (as in the case of the grant of 1866 to the Southern Pacific Railroad Company), laches is not imputable to the grantee, because of delay in completing its road and making its indemnity selections, in a contest with one who has attempted to make a pre-emption entry after the filing of the map of general route.

Appeal from the Circuit Court of the United States for the Southern District of California.

William F. Herrin, John Garber, and William Singer, Jr., for appellant.

W. B. Wallace, for appellees.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The Southern Pacific Railroad Company brought suit against the appellees to obtain a decree that the appellees hold in trust a patent which Otto Groeck received from the United States to a certain tract of land, which it is contended was land granted by the United States to the railroad company by the act of date July 27, 1866. Section 18 of said act authorized the appellant to construct the railroad which now extends from San Francisco, by way of Mojave, to the Needles on the Colorado river. Section 3 provided as follows:

"That there be, and hereby is, granted * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of * * * ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title * * * at the time the line of said railroad is desig-

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nated by a plat thereof, filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of the said alternate sections."

Section 6 of the act provided as follows:

"That the president of the United States shall cause the land to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act."

The bill alleges that the appellant accepted the terms of the grant, fixed the general route of its road as contemplated by the act, and on January 3, 1867, filed a map thereof in the office of the commissioner of the general land office; that on that date the commissioner accepted and approved the map and the route designated by it, and on March 22, 1867, under the direction of the secretary of the interior, he withdrew the odd sections of land lying within 30 miles of the line of road from sale or location, pre-emption or homestead entry; that on November 2, 1869, the secretary of the interior made an order declaring the withdrawal revoked; that on December 15, 1869, the secretary suspended his order of November 2d; that on July 26, 1870, the secretary restored the withdrawal of March 22, 1867; that on August 15, 1887, the secretary declared the withdrawal of March 22, 1867, revoked, as to the indemnity sections thereof; that the appellant commenced to build its road during the year 1870, and completed the construction in different sections between that date and the year 1889,—the last section, extending from Huron westerly to Alcalde, having been constructed during the year 1888; that the land in suit is opposite to, and coterminous with, that section, and is within the indemnity limits of the grant, and is not included in any exception therefrom; that on September 2, 1885, the appellee Groeck settled on the land in controversy, and during the same month filed his pre-emption claim therefor in the proper land office of the United States, and thereafter complied with the land-office regulations, and on June 7, 1886, made pre-emption proof and payment for the land; that on April 11, 1890, patent was issued from the United States, conveying the land to him; that, as the appellant's road was constructed in several sections, such sections were examined by commissioners appointed by the president, as provided by section 4 of the act, and that said commissioners reported that such sections had been completed as required by the act, and thereupon the president accepted and approved the reports; that a map of the definite location of said section between Huron and Alcalde was filed with and approved by the secretary of the interior on April 2, 1889, and the president accepted and approved the commissioners' report on that section on November 8, 1889; that on July 13, 1891, the appellant, acting under the direction of the secretary of the interior, selected the land

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in suit, as granted to it by the act. To the bill of complaint the appellees filed a plea asserting the validity of Groeck's pre-emption, and the title thereby acquired, and further alleging that in any event the appellant, "by its long delay in asserting any claim to said land, in filing its map of definite location, and in offering to select said land, is barred by its laches from asserting claim thereto." Upon the plea so interposed the court denied the right of the appellant to the relief prayed for, upon the ground of its laches, and decreed that the bill be dismissed. The questions presented upon the appeal are: First, was the land in controversy lawfully subject to the pre-emption entry of Groeck? and, second, is the appellant's right to the relief sued for barred by its laches, as alleged in the plea?

The land in controversy was at the time of the entry by Groeck, and at the time when he took steps to acquire title thereto, withdrawn from settlement by the act of the secretary of the interior. It was land to which section 2258 of the Revised Statutes applied, in declaring that:

> "The following classes of lands, unless otherwise specifically provided by law, shall not be subject to the rights of pre-emption, to wit: First, lands included in any reservation by any treaty, law, or proclamation of the president, for any purpose."

It is true that in 1891, at the time when patent issued, the order of withdrawal of March 22, 1867, had been set aside by the secretary of the interior; but, as we understand the decision of the supreme court in the case of Riley v. Welles, 154 U. S. 578, 14 Sup. Ct. 1166, no valid pre-emption could be made of lands which were withdrawn from settlement by the officers of the land department, and such entry, if made, could not become the basis of title, even upon the subsequent cancellation of the order of withdrawal, since the acts of the settler upon such lands were acts done in violation of law, and void. This was held in a case in which "it was afterwards found that the law by reason of which this action was taken did not contemplate such a withdrawal." Wood v. Beach, 156 U. S. 550, 15 Sup. Ct. 410. But it is urged that the act of withdrawal was a ministerial act upon the part of the secretary of the interior, such as could be set aside at any time by that officer, and that to permit a pre-emption entry to be made, as was done in this case, and to recognize its validity, was, in effect, to set aside the order of withdrawal, and was tantamount to a cancellation thereof, so far as it included the particular lands so entered. The case of Riley v. Welles may be cited likewise in opposition to this contention. But it is not necessary to rest the question of the appellees' title upon the doctrine of that case alone. A careful consideration of other decisions of the supreme court determining the nature of the right which the grantee of such a grant acquires to lands within the indemnity limits, prior to the time when definite location and selection of lieu lands is made, leads us to the conclusion that, in the case of a grant such as that now under consideration, by the operation of the terms of the grant itself the indemnity lands are withdrawn from settlement from the moment when a map of the

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general route of the road is made and filed. It may be deduced from those decisions that the grant to the appellant conferred upon the grantee, within the indemnity limits, more than the mere right to initiate a title by selection, and that the lands in the indemnity limits are as truly granted lands, within the terms of the act, as are the lands within the place limits. The difference is in the preliminary steps which are requisite to attach the title to the particular tracts which are granted. Thus, the supreme court has held that, when the lands within the indemnity limits are all needed to make up the granted quantity, the grant to the indemnity lands takes effect at the same time, and is of the same nature, as the grant of the lands in the place limits. St. Paul & S. C. R. Co. v. Winona & St. P. R. Co., 112 U. S. 720, 726, 5 Sup. Ct. 334. In St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 1, 11 Sup. Ct. 389, answering the objection that no evidence was offered showing a selection of lieu lands, the court said:

"It is sufficient to observe that all the lands within the indemnity limits only made up in part for those deficiencies. There was therefore no occasion for the exercise of the judgment of the secretary of the interior in selecting from them, for they were all appropriated."

But, where the lands in the indemnity limits exceed the total quantity which is granted by the act, they remain afloat until selection is made as required by the act. In Buttz v. Railroad Co., 119 U. S. 55, 7 Sup. Ct. 100, Mr. Justice Field, referring to section 6 of the Northern Pacific Company's act, said:

"The act of congress not only contemplates the filing by the company in the office of the commissioner of the general land office of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not at that time been reserved, sold, granted, or otherwise appropriated, and are free from pre-emption, grant, or other claims or rights, but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry, or pre-emption of the adjoining odd sections within forty miles on each side until the definite location is made."

In Northern Pac. R. Co. v. Musser-Sauntry Land, Logging & Manufacturing Co., 168 U. S. 608, 611, 18 Sup. Ct. 205, 206, the court said:

"But beyond the significance of the word 'reserved,' alone, there are other words in the act which, taken in connection with it, make it clear that these lands do not fall within the grant. 'Otherwise appropriated' is one term of description, and evidently when the withdrawal was made in 1866 it was an appropriation of these lands, so far as might be necessary for satisfying that particular grant. It is true, it was not a final appropriation, or an absolute passage of title to the state or the railway company, for that was contingent upon things thereafter to happen—First, the construction of the road; and, second, the necessity of resorting to those lands for supplying deficiencies in the lands in place; still, it was an appropriation for the purpose of supplying any such deficiencies."

Continuing, on page 611, 168 U. S., and page 207, 18 Sup. Ct., the court said:

"Neither is it intended to question the rule that the title to indemnity lands dates from selection, and not from the grant. All that we here hold is that when a withdrawal of lands within indemnity limits is made in aid of an earlier land grant, and made prior to the filing of the map of definite location by a company having a later grant,—the latter having such words of exception

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and limitation as are found in the grant to the plaintiff,—it operates to except the withdrawn lands from the scope of such later grant."

In U. S. v. Southern Pac. R. Co., 146 U. S. 570, 600, 13 Sup. Ct. 152, 158, the court said:

"When the general route of the road is thus fixed in good faith, and information thereof given to the land department by filing a map thereof with the commissioner of the general land office or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections, to the extent of forty miles on each side. The object of the law in this particular is plain. It is to preserve the land for the company to which, in aid of the construction of the road, it is granted."

In the case of Wood v. Beach, 156 U. S. 548, 15 Sup. Ct. 410, the land which was in controversy lay within the indemnity limits of two railroad grants,—a grant to the Leavenworth, Lawrence & Galveston road, and a grant to the Missouri. Kansas & Pacific Railway. Act July 26, 1866. Wood made a homestead entry prior to the selection of the lands in the indemnity limits by the railroad companies, but years after the lands had been withdrawn from sale, pre-emption, or homestead entries, under two orders of withdrawal,—one for each company. In construing section 4 of the act granting lands to aid the construction of the second road, in which it was provided "that as soon as said company shall file with the secretary of the interior maps of its line, designating the route thereof, it shall be the duty of said secretary to withdraw from the market the lands granted by this act in such manner as may be best calculated to effect the purposes of this act and subserve the public interest," the court said, "These withdrawals were not merely executive acts, but the latter one, at least, was in obedience to the direct command of congress." If such withdrawal takes place by operation of law, as has been said by the supreme court in these decisions, the secretary of the interior is powerless to affect the rights of the grantee by setting aside his order of withdrawal. Nor does he acquire such power from the fact that the period has expired within which the grantee is required to complete the road. The expiration of the time so limited by law for the construction of the road is a matter which rests between congress and the grantee. The delay may afford congress excellent reason to declare the land grant forfeited, but congress alone has the power to declare such forfeiture. After such lands have once been set aside by congressional act, no authority is vested in the secretary of the interior, or in any officer of the land department, to restore them, or open them to settlement. Nor is any right conferred upon a pre-emption settler to take advantage of such default of the grantee.

It follows from the rulings of the supreme court in the decisions to which we have referred that the plea of laches cannot avail the appellees. The laches is said to consist in the long delay of the railroad company in constructing the road and selecting the indemnity lands. We are unable to perceive how that delay has conferred rights upon the pre-emption settler, or how it now affords him ground to impute inequity to the company. The company owed no duty to any intended settler upon the public domain. The United States did not offer this land to Groeck, nor did it invite his occupancy or entry. He was a trespasser on the premises. His pre-emption entry was

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not only void, but it was unlawful. Neither such an entry, nor the payment of the purchase price, nor the issuance of the patent, could place him in a position to plead laches, as against the title asserted by the railroad company. Said the court in Wood v. Beach:

"It is clear that Mr. Wood acquired no equitable rights by his occupation and settlement. He went upon lands which were not open to homestead or pre-emption entry, and cannot make his unauthorized entry the foundation of an equitable title."

The appellees cite and rely upon the cases of Railroad Co. v. Herring, 110 U. S. 27, 3 Sup. Ct. 485, and Galliher v. Cadwell, 145 U. S. 368, 12 Sup. Ct. 873. In the first of these cases the grant to the railroad company provided for the withdrawal when a map definitely showing the line of road should be filed. The map was not filed until three years and a half after the passage of the act. During this period homestead and pre-emption entries were made. The court held that no obligation rested upon the government to withdraw the lands from sale until the grantee filed a map in the general land office, definitely showing the entire line of its road, and that in the meantime the lands were open to pre-emption and homestead entry. It is readily seen that the facts in that case clearly distinguish it from the case at bar. In Galliher v. Cadwell it was said by the court:

"Laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced,—an inequity founded upon some change in the condition or relations of the property or the parties."

There are no facts in the present case to which that language is applicable. The appellant and Groeck were not in the attitude of persons to whom the land in controversy was offered upon equal terms, giving to the first entryman the prior right. It was offered only to the railroad company. The facts stated in the bill and in the plea are insufficient to show that the company has in any respect dealt inequitably with Groeck. This is not a case in which it has delayed enforcing its rights to the detriment of another. The delay in constructing the road and in selecting the lieu lands has worked no wrong to Groeck. So long as the United States made no complaint of the delay, no equity was created thereby in favor of any intending settler. And no such settler could take it upon himself to say that the grantee had forfeited any of the rights specified in the grant. The company was not required to give Groeck notice of its rights in the premises. He was bound to take note of the law, which itself gave him notice. In short, no facts exist on which laches may be imputed to the railroad company for any delay upon its part short of the statutory period of limitation whereby its right to obtain the relief sued for would be absolutely barred. The suit was brought within less than three years after definite location, which was the earliest time when selection could have been made, in less than two years after the issuance of Groeck's patent, and within less than one year after selection was made. The decree will be reversed, and remanded to the circuit court for further proceedings not inconsistent with this opinion.

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(87 Fed. 976.)

RYLE et al. v. KNOWLES LOOM WORKS.

(Circuit Court of Appeals, Third Circuit. June 29, 1898.)

1. CONDITIONAL SALES—RIGHTS OF CREDITORS.
In Pennsylvania a sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase price is paid, is void as to creditors of the vendee and innocent purchasers; and this rule applies, whatever the form of the agreement.

2. BAILMENT—RIGHTS OF CREDITOR.
Where personal property is delivered under a contract of bailment, accompanied with an agreement for a future sale to the bailee on the payment of a certain price, the ownership of the bailor is preserved, and the transaction is valid, even as against the creditors of the bailee and innocent purchasers.

3. CONDITIONAL SALES—RIGHTS OF CREDITORS—LEASE AS SECURITY.
In Pennsylvania, a reservation of title, by an instrument in the form of a lease, as security for the purchase price of personal property sold and delivered, is unavailing as against creditors and innocent purchasers; and it matters not that the lease was contemplated from the beginning, and the property delivered in pursuance of that contemplation.

4. REPLEVIN—DEFENSES—RIGHTS OF MORTGAGE BONDHOLDERS.
In replevin for machinery sold by the plaintiff, with reservation of title as security for the purchase price, the rights of innocent mortgage bondholders under a mortgage executed by the vendee are available as a defense.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was an action of replevin by the Knowles Loom Works against William Ryle and others to recover possession of certain machinery. In the circuit court, verdict and judgment were given for plaintiff, and the defendants sued out this writ of error.

Robert B. Honeyman, for plaintiffs in error.
Benno Loewy and J. M. Rommell, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

ACHESON, Circuit Judge. It is, and long has been, the established rule in Pennsylvania that a sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase price is paid, is ineffectual and void as respects the creditors of the vendee and innocent purchasers; and the rule applies, whatever may be the form of the agreement. Haak v. Linderman, 64 Pa. St. 499; Stadtfeld v. Huntsman, 92 Pa. St. 53; Thompson v. Paret, 94 Pa. St. 275; Brunswick & Balke Co. v. Hoover, 95 Pa. St. 508; Forrest v. Nelson, 108 Pa. St. 481; Dearborn v. Raysor, 132 Pa. St. 231, 20 Atl. 690; Farquhar v. McAlevy, 142 Pa. St. 233, 21 Atl. 811; Ott v. Sweatman, 166 Pa. St. 217, 31 Atl. 102. But where personal property is delivered under a contract of bailment, accompanied with an agreement for a future sale to the bailee on the payment of a certain price, the ownership of the bailor is preserved, and the transaction is valid, even as against the creditors of the bailee and purchas-

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ers. Rowe v. Sharp, 51 Pa. St. 26; Enlow v. Klein, 79 Pa. St. 488; Printing-Press Co. v. Jordan, 171 Pa. St. 474, 32 Atl. 1031. Within which of the two above-stated rules does the present case fall? The material facts are these:

On March 16, 1895, the Cutter Silk Manufacturing Company signed and delivered to the plaintiff in this replevin suit (Knowles Loom Works), and the latter accepted and agreed to, the following written proposal or order:

"New York, March 16th, 1895.

"Knowles Loom Works—Gentlemen: Please build for us one hundred silk looms, 35 in. 20 harness 4x4 box, with multiplier and angular drive ½ each right and left, with Jacquards, 600 hooks rise and fall, three levers; price, two hundred and eighty dollars each. Terms of payment: Notes bearing interest, 6 per cent. per annum, and maturing twelve months from the average date of delivery, but to be written 'six months,' for convenience, and renewed as per above. The Knowles Loom Works to own the machinery until paid for, as per their usual form, and to hold, also, in first mortgage bonds of the Cutter Silk Mfg. Co., fifteen thousand [dollars], as collateral security towards the payment of said notes. Cutter Silk Mfg. Co.,

"By John D. Cutter, Prest."

In pursuance of the contract thus entered into, the plaintiff delivered to the Cutter Silk Manufacturing Company the specified machinery, and the same was set up in the company's mill at West Bethlehem, Pa.; the looms being fastened to the floor by the ordinary leg screws, and the Jacquards attached to the looms. The delivery began early in April. One-half of the machinery was delivered and set up in the mill before May 18th, and all of it was delivered and set up before July 12, 1895, except 18 Jacquards, of the value of $810, which were delivered shortly after the date last mentioned. On May 18, 1895, the Cutter Silk Manufacturing Company executed and delivered its mortgage on its mill, including "all machinery now placed or hereafter to be placed on said mortgaged premises," to the E. P. Wilbur Trust Company, in trust to secure an issue of $100,000 of the mortgagor's bonds, payable to bearer; and on May 22, 1895, the mortgagee accepted the trust. The mortgage was duly recorded on May 23, 1895. The price of the entire machinery delivered as above mentioned by the plaintiff was $29,650. For this sum the Cutter Silk Manufacturing Company on July 12, 1895, gave to the plaintiff its promissory notes, namely, its two notes dated July 12, 1895, payable in 30 days, one for $3,650, with interest, and one for $4,000, with interest; its four notes dated July 1, 1895, each for $5,000, payable six months after date, with interest; and its note dated July 1, 1895, for $2,000, payable six months after date, with interest. On the same day these notes were given, namely, July 12, 1895, the plaintiff and the Cutter Silk Manufacturing Company executed the following instrument of writing:

"Articles of agreement made and concluded this first day of July, A. D. 1895, between the Knowles Loom Works, of Worcester, in the county of Worcester and commonwealth of Massachusetts, of the one part, and Cutter Silk Mfg. Co., of Bethlehem, county of Lehigh, state of Pennsylvania, of the other part: I. The said Knowles Loom Works doth hereby rent unto the said Cutter Silk Mfg. Co. the following described property, to wit: 100—35"—20 harness 4x4 box silk loom, with Jacquards; piano card-cutting machine, repeater, and press,—for the period of one year from the date hereof, at a

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rental or price of twenty-two thousand dollars per annum; said rental to be paid on or before the first day of July, 1896. II. The said Knowles Loom Works doth agree to make a sale of said machinery to said Cutter Silk Mfg. Co., at any time prior to the expiration of this lease, for the cash price or sum of twenty-two thousand dollars, provided the herein reserved rental and insurance shall have been promptly paid, and will allow as a credit on such purchase all of the said rental so paid. III. The said Cutter Silk Mfg. Co. agrees to pay, promptly as they shall become due, to the said Knowles Loom Works, both the said rental and all expenses incurred by it during the continuance of this lease in keeping said machinery insured; to maintain the same in good order and repair during said term; and in the event of any failure to pay the said rent as it becomes due, or at the termination of this lease, to immediately surrender said machinery to said Knowles Loom Works, its successors or assigns, or allow it or them to retake possession of the same. In witness whereof, the said parties hereunto set their hands and seals the day and year first above written.

Knowles Loom Works. [Seal.]
"J. M. Russell, Cashier.
"Cutter Silk Mfg. Co. [Seal.]
"John D. Cutter, Prest.

"Sealed and delivered in presence of Frank E. Stevens."

The oral testimony respecting this paper was conflicting. Mr. Stevens, the vice president of the Cutter Silk Manufacturing Company, testified that a lease was never mentioned prior to July 12, 1895. On the other hand, Mr. Markoe, who conducted the original negotiations on the part of the plaintiff, stated that it was "understood between Mr. Cutter and myself that a lease would be drawn up to that effect"; and upon cross-examination he testified thus:

"X-Q. Was the word 'lease' used between you and Mr. Cutter, or a suggestion about reservation of title? A. The question of lease,—that the looms were to remain the property of the Knowles Loom Works until paid for. By the Court: X-Q. Was it said how? A. The usual form that our people used for lease at that time. X-Q. Then the word 'lease' was mentioned? A. It was."

The Cutter Silk Manufacturing Company paid its two notes at 30 days, aggregating $7,650, at or before the maturity thereof. Its other notes, aggregating $22,000, were renewed at maturity. The renewal notes were not paid. On March 30, 1896, the Cutter Silk Manufacturing Company made a voluntary assignment for the benefit of its creditors. Before this assignment at least $45,000 of the bonds secured by the mortgage of May 13, 1895, had been negotiated, and were in the hands of bona fide holders for value. Prior to the bringing of this suit the defendant William Ryle had become the purchaser and holder of these bonds, and he had also purchased the equity of redemption in the mortgaged premises from the voluntary assignee, and he was in possession of the mill and machinery when the writ of replevin issued.

The court below instructed the jury, as matter of law, that the transaction between the plaintiff and the Cutter Silk Manufacturing Company respecting this machinery was a bailment, and, therefore, that the plaintiff had a right to recover the value of the machinery in this action. The only question submitted to the jury was that of value. We are now to determine whether these instructions were correct.

In our treatment of this case, we naturally begin with the paper of March 16, 1895, showing the original contract relating to this machinery. Substantially the whole of the machinery was delivered on

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the footing of that paper alone. It was the only contract on the subject in existence when the trust mortgage took effect. Now, the paper of March 16th fixed the purchase price of the machinery, and the terms of payment. Interest-bearing notes were to be given and received in payment; and, what is very significant, the Knowles Loom Works was to take and hold $15,000 of the mortgage bonds of the Cutter Silk Manufacturing Company as collateral security for the payment of the notes. These provisions, we think, plainly import a sale of the machinery. The stipulation that the Knowles Loom Works was "to own the machinery until paid for" seems to us to negative the idea that the parties had in view a bailment (Summerson v. Hicks, 134 Pa. St. 566, 569, 19 Atl. 808); for, upon a bailment, ownership remains in the bailor, as of course. This stipulation implies a sale with a reservation of title, to secure the purchase price. A lease is not named in the paper. If, however, the words "as per their usual form" are referable to a lease, they must be read in connection with the context: "The Knowles Loom Works to own the machinery until paid for, as per their usual form, and to hold, also, in first mortgage bonds of the Cutter Silk Mfg. Co., fifteen thousand [dollars], as collateral security towards the payment of said notes." If a lease was here contemplated, undoubtedly it was a lease to secure the purchase price of the machinery. The oral testimony put no different face upon the matter. But it is the declared law of Pennsylvania that a reservation of title, by an instrument in the form of a lease, as security for the purchase price of personal property sold and delivered, is unavailing as against creditors and innocent purchasers; and it matters not that the lease was contemplated from the beginning, and the property was delivered in pursuance of that contemplation. Brunswick & Balke Co. v. Hoover, supra; Farquhar v. McAlevy, supra. In Cooper v. Whitmer, 6 Atl. 571, the supreme court of Pennsylvania said:

> "The word 'lease' being by common consent part of the written contract of the parties, the case comes clearly within the ruling of this court in Brunswick & Balke Co. v. Hoover, 95 Pa. St. 508. The agreement is, beyond doubt, a sale of the property, with a provision for a lease security which was good enough between the parties, but worthless as against creditors."

In Farquhar v. McAlevy, as in Brunswick & Balke Co. v. Hoover, the lease was stipulated for in the original contract, which, as here, was in the form of an order for machinery.

We find nothing in what was done on July 12, 1895, to change the complexion of the case. Evidently the short-time notes for $7,650 were given and taken on account of the purchase money of the machinery. It is idle to suggest that these notes represent rent. They were not embraced in the so-called lease executed that day. That instrument covered only the balance of the purchase price, namely, $22,000, for which the other notes were given. The paper calls for "a rental or price of twenty-two thousand dollars per annum." This was rental in name, but price in fact. The lease ran for a single year only, and this large lump sum was to be paid at the end of the year, or before. Regarding the two instruments of March 16th and July 12th as parts of one and the same transaction,—which is the

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most favorable view that can be taken for the Knowles Loom Works, —the conclusion is irresistible that the transaction was not a bailment, but a sale, of the machinery, with a lease security for the price. The case is not distinguishable from those of Brunswick & Balke Co. v. Hoover, Cooper v. Whitmer, and Farquhar v. McAlevy, supra.

In Summerson v. Hicks, supra, the parties, under date of October 31, 1885, signed the following paper:

"This is to certify that I have this day leased to John Summerson 1 pair of dark-bay horses, for the sum of one hundred and twenty-five dollars, to be paid by the first of April, 1886; and in case the said John Summerson shall fail to make such payment as above agreed, to me (Mary Hicks), then I shall have full and free possession of said horse team; and it is further agreed that the ownership shall remain in hands of Mary Hicks until payment is made in full."

Concerning this paper the supreme court of Pennsylvania, speaking by Mr. Justice Mitchell, said:

"It is called a lease, but it is manifestly a sale. No term is stipulated for the hiring, or any rate per month or per annum. On the contrary, it is merely said that the horses are leased for a lump sum of one hundred and twenty-five dollars. But what is conclusive of the character of the transaction, is the stipulation that 'the ownership shall remain in Mary Hicks until payment is made in full.' If it was merely a hiring, the ownership would have remained in Mrs. Hicks all the time, without any such stipulation."

All the indicia of a sale here commented on are present in this case, taking into account the two papers of March 16th and July 12th.

The authority of the decisions upon which we base our judgment is not in any degree shaken by the case of Printing-Press Co. v. Jordan, 171 Pa. St. 474, 32 Atl. 1031. There, while the original intention of the parties was to make a sale, yet, before their purpose was consummated, and when the first agreement still remained wholly executory, it was superseded by a contract of bailment. The printing press had not been delivered or accepted, but had been set up for trial, merely. No intervening rights had sprung up, and the parties were entirely free to contract with respect to the press. Here the facts are essentially different. As we have seen, the great bulk of the machinery was delivered and accepted under the first contract, and the property had become subject to the trust mortgage before the second instrument was executed.

To the amount of $45,000 of the mortgage bonds, the defendant William Ryle is clothed with the rights of the original bona fide holders, who took them, it would seem, free from notice of the alleged lease. Porter v. Steel Co., 122 U. S. 267, 283, 7 Sup. Ct. 1206. As against the innocent mortgage bondholders, and those claiming under them, the plaintiff had no right to strip the mill of this machinery and carry it away. Undoubtedly the rights of the mortgage bondholders are available as a defense here. In replevin a plea of property puts the plaintiff to proof of title in himself, and his right to exclusive possession. Reinheimer v. Hemingway, 35 Pa. St. 432, 438; Mathias v. Sellers, 86 Pa. St. 486, 492. The judgment is reversed, and the cause is remanded to the circuit court, with direction to set aside the verdict and grant a new trial.

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(87 Fed. 1001.)

THE EUGENE.

(Circuit Court of Appeals, Ninth Circuit. May 12, 1898.)

No. 430.

1. APPEAL AND ERROR—FINALITY OF DECREE.
A decree in admiralty, awarding libelants a definite sum, adjudging that a maritime lien exists therefor, and directing the sale of the vessel and payment of the proceeds into the registry to await the further order of the court, is a final appealable decree.[1]

2. SAME—MARITIME LIENS—BREACH OF CONTRACT.
There can be no maritime lien against a vessel for breach of a contract of carriage where she never in fact entered on the performance thereof, and neither the libelants nor their baggage were ever received on board, or placed in the care or control of the master. 83 Fed. 222, affirmed.

Appeal from the District Court of the United States for the Northern Division of the District of Washington.

Williams, Wood & Linthicum, for appellant.
John C. Hogan and Patterson & Easley, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The appellant is claimant of the steamboat Eugene, and brings this appeal from the decree of the court below against the steamboat and in favor of the libelants and of Walter M. Cary, Fred M. Lyons, and Edward J. Knight, named in the decree as interveners, each in the sum of $800, and directing that a writ of venditioni exponas issue against the vessel to satisfy the decree, with costs. Exceptions to the original libel having been sustained (83 Fed. 222), the libel was amended. As amended, it alleges, in substance, that the defendant Portland & Alaska Trading & Transportation Company was, during the times therein mentioned, a common carrier by water of passengers, baggage, and freight between the city of Seattle, Wash., and Dawson City, on the Yukon river, one E. B. McFarland being its general manager, and one C. W. Gould its transportation agent; that during all of the times mentioned the trading and transportation company owned and operated, in connection with its said business, the steamboat Eugene, and also operated, in the same connection, a steamship known as the Bristol; that on, prior, and subsequent to August 11, 1897, the Eugene and the respondent company caused it to be publicly and extensively advertised that the Eugene, in tow of the Bristol, would leave Seattle for Dawson August 23, 1897, and would transport passengers to the number of 350, or less, including their baggage and freight, not to exceed 1,500 pounds each, and would reach Dawson City not later than September 15, 1897; that, relying upon the good faith of those adver-

[1] As to finality of judgments and decrees for purposes of review on error or appeal in the federal appellate courts, see note to Trust Co. v. Madden, 17 C. C. A. 239, and supplementary note to Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co., 28 C. C. A. 483.

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tisements, and believing those representations, and others of like effect, to be true, the libelants, on or about August 19, 1897, made and entered into a contract with the steamer Eugene, wherein and whereby that boat undertook and agreed to carry the libelants from the city of Seattle to Dawson City, and to leave Seattle on the voyage on the 24th day of August, 1897, and to reach Dawson City not later than September 15th of the same year; that the contract further provided that the Eugene should leave Seattle on the voyage in tow of the steamship Bristol, and should be towed by the Bristol from Seattle to the port of St. Michaels, Alaska, from which place the Eugene should continue the voyage alone up the Yukon river to Dawson City; in consideration of all which each of the libelants paid for passage on said steamer Eugene, with 1,500 pounds of baggage, the sum of $300, and received tickets for such passage. The amended libel further alleges that on the 24th day of August, 1897, the Eugene entered upon the performance of the alleged contract, and left the city of Seattle in tow of the Bristol, and undertook to carry the libelants and other passengers over the whole of the said voyage, and proceeded thereon 600 or 700 miles on the high seas to the coast of Alaska, where she abandoned the voyage, and refused to proceed further thereon. It is alleged that the libelants were landed at Victoria, B. C., each of whom was thereby damaged in the sum of $1,000 by reason of the loss of outfit, loss of time, and passage money. After the filing of an answer to the amended libel by the claimant, Walter M. Cary, Fred M. Lyons, and Edward J. Knight served upon the proctors for the claimant a petition in intervention, claiming the same relief against the steamboat Eugene upon a precisely similar state of facts; in respect to which intervention the respective parties stipulated that it should abide the result of the trial of the issues between the libelants and the claimant. One C. Hennigar also intervened in the cause for repairs made upon the Eugene subsequent to the libelants' claims, but afterwards that intervention was, by stipulation of the respective parties, eliminated from consideration. The decree awarded damages in favor of each of the libelants and interveners in the sum of $800, and further decreed that the vessel libeled be sold, and the proceeds paid into the registry of the court, after deducting the costs of sale, there to await the further order of the court in respect to their distribution.

The appellees, claiming that the decree is not a final one, move to dismiss the appeal on that ground. There is nothing in the point. The decree awards a definite sum to each of the libelants and interveners, decrees that a maritime lien exists therefor upon the Eugene, and directs the execution of the decree by the sale of the boat by the marshal under the admiralty process of the court. Such sale would divest the claimant of all title to the vessel. The direction that the marshal pay the proceeds into the registry of the court, there to await the further order of the court in respect to their disposition, was a mere incident. The merits of the controversy between the parties remained concluded by the decree, from which any dissatisfied party had the right of appeal. Whiting v. Bank, 13 Pet. 6; Forgay v. Conrad, 6 How. 204; Withenbury v. U. S., 5 Wall. 819; Hill v.

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Railroad Co., 140 U. S. 52, 11 Sup. Ct. 690; The Alert, 9 C. C. A. 390, 61 Fed. 115. Hennigar was not a party to the proceedings sought to be reviewed. His intervention was, by the stipulation of all of the parties, withdrawn from consideration. See Gilfillan v. McKee, 159 U. S. 303, 16 Sup. Ct. 6.

In respect to the merits, but little need be said. The libels are based upon alleged contracts by which, in consideration of the payment of $300 each, the steamboat Eugene undertook and agreed to transport the libelants and interveners, with 1,500 pounds of freight each, from the city of Seattle to Dawson City. The difficulty in the way of affirming the decree (apart from the question raised as to the amount of damages awarded) is that the proof wholly fails to show that the Eugene ever undertook or agreed to transport either of the libelants or interveners from Seattle to Dawson City. On the contrary, the proof shows, without conflict, that the Eugene was to transport them from St. Michaels, Alaska, to Dawson City only. Upon the performance of that undertaking the Eugene never entered, nor did she ever receive on board either of the libelants or interveners, or any of their freight or baggage. We can discover no ground upon which a lien upon that boat can be sustained in favor of the appellees, or either of them. Decree reversed, and cause remanded for further proceedings not inconsistent with this opinion.

(87 Fed. 1005.)

HAWKHURST S. S. CO., Limited, v. KEYSER et al.

KEYSER et al. v. HAWKHURST S. S. CO., Limited.

(Circuit Court of Appeals, Fifth Circuit. May 24, 1898.)

No. 653.

1. CHARTER PARTY—DEMURRAGE—STRIKES.
   Where the lay days of a vessel being loaded by respondent merchants are fixed, but exceptions from the running thereof include the term "strikes," merchants should not be held liable for demurrage, even though the alleged strike was brought about by the demands of the merchants that the laborers engaged in loading the vessel should conform to certain rules and regulations which are perfectly reasonable in themselves.
2. SAME.
   Notwithstanding the fact that the charterers acquiesced in certain customs of baymen while loading their ships for some time previous to a strike, this is not a waiver of their right to insist upon their abandonment of such customs if the same are unreasonable, nor is it evidence of their justness.

Appeal and Cross Appeal from the District Court of the United States for the Northern District of Florida.

This was a libel in personam to recover demurrage under a charter party. A decree was rendered below for part of libelant's claims, and both parties have appealed. The opinion filed below, and here reprinted from 84 Fed. 693, was in full as follows:

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SWAYNE, District Judge. This is an action in personam, on the admiralty side of this court, to enforce the payment of demurrage, and arose out of almost the same circumstances as, and the allegations in libel and answer are similar to, those in the case of Wood v. Keyser (decided at this term of court) 84 Fed. 688. However, this case presents some additional facts, and an additional phase of the strike question to that decided in that case. The answer, among other allegations, sets forth certain methods insisted upon by the labor organizations, which had, as members, all the available timber workers in Pensacola Bay, where the ship was being loaded. The allegations in the answer, which, from the record, I must take as fairly representing the facts, so far as this matter is concerned, set up the following:

"The said labor organizations had for years arbitrarily dictated to the timber merchants at Pensacola not only the matter of wages, but also as to the manner of loading vessels at said port with timber, by means of rules and regulations and practices insisted upon, the effect of which was to require the members to work only in a certain way, which deprived their employers of the full and reasonable work which they could and would perform but for such rules and regulations. That such rules and regulations prohibited what is called 'skull dragging,' which is pushing sticks of timber, over rollers or skulls, into position by hand, after being placed in the port of a vessel; such prohibition causing a loss of time, and the employment of extra men to move the timber, by attaching a dog and chain, and drawing it into place by means of winches and winchmen. That such rules and regulations required that a steamship should be loaded as two ships; the compartments forward of the smokestack being taken as one ship, and the compartments aft of the smokestack being taken as another, and not permitting men to be changed from one to the other, so that in many instances the cost of stowing a small quantity of timber would be greater than its value. That the said rules and regulations of the said associations also required that no matter how small a quantity of timber remained to be placed in the ship after the usual hours completing the last full day's work, as permitted by the associations, the ship should wait until the following day to finish loading, and then that a half gang of men should be employed, and paid for a full day, though but one hour's time might be required for the work. That the said rules and regulations also forbade the use of steam in any manner, and under any circumstances, in the loading of the ship, although steamships were provided with all the facilities for such purposes, and could thereby be loaded more expeditiously, and notwithstanding that the master and owners of the said ships were ready and anxious to supply ships with such facilities without charge, as is customary at all ports except Pensacola. That the practice of the said associations was to stop all work of loading ships in the bay whenever a member of one of the associations died. That the said merchants, including respondents, with but one or two exceptions, decided and notified the said associations that they would not submit longer to the unjust rules and regulations and practices aforesaid of the said associations in regard to the loading of timber of ships," etc.

Under these circumstances the charterers undertook to supply what may be called reasonable terms of employment, under which timber stowers were to be employed in vessels chartered by respondents. Among these terms insisted upon were: (1) That the death and funeral of a member of the associations should not cause a cessation of the work upon the vessels; (2) that skull dragging, or the placing of timber in position in the hold of a vessel by pushing same by hand over skulls or wooden rollers, should be regarded as proper to be insisted upon by said merchants; (3) that gangs of men might be

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required to work in any part of the ship, either in fore or aft hatches, interchangeably; (4) that charterers should have privilege to employ members to work overtime at one dollar per hour, in order to complete loading, when only small quantity left over on last day; (5) merchants to have privilege of using steam power of vessel, paying wages of same number of men, whether actually employed in loading or not. The record nowhere discloses any allegation or inference that these conditions were unreasonable or unjust to the workingmen, but, on the contrary, from their terms, they appear just and reasonable towards all concerned; and, although the respondents may have acquiesced for some time in these usages, yet this is not evidence of their justness, or a waiver of their right to insist upon their abandonment. If the customs in controversy are unreasonable, the demands of the merchants at that time for their abandonment would, in my opinion, be exactly analogous to a demand on the part of the baymen or stowers of timber that the said customs, supposing the same had not theretofore existed, should be observed in the future, and the merchants, deeming them unreasonable, refused to comply with said demands. A strike, occurring under these circumstances, being a refusal of a combination of all available workmen to work upon terms which must be viewed by this court as reasonable, seems to fall within the meaning of the strike clause or exception as clearly as where it results from a demand of an advance of wages. If the merchants must submit to the unjust rules and regulations of the labor associations to-day, when, and in the loading of what ships, will it be right for them to take a stand? Beach on the Modern Law of Contracts, at section 238, vol. 1, says:

"Where a 'strike clause' is inserted in a contract, excepting liability in case of failure to perform, occasioned by a strike, the contractor is not thereby prohibited from conducting his business upon the same general principles which would have governed him had the clause not been inserted; nor is he required to resort to extraordinary or unusual means to prevent strikes, but he has the right to adopt such rules and regulations and pay such wages as are reasonable under the circumstances."

In speaking of the strike clause in the contract before it, the court of appeals of New York (Railway Co. v. Bowns, 58 N. Y. 574) says that the additional agreement, that "every effort will be made by the company for the fulfillment of the contract," will not be interpreted as requiring the performance at all events, if within the power of the company; and then, passing to the "strike clause" proper, that court says:

"The strike was immediately preceded, and proximately caused, by a reduction of the wages by the employer; and the contention of the defendant is that as the strike resulted from the voluntary act of the plaintiff, and would not have occurred but for that act, the plaintiff cannot have the benefit of that exception and exemption from liability. But parties may agree in advance under what circumstances and upon what contingencies the contract shall terminate, or either party be absolved from its obligations; and if the circumstances occur or the contingency happens, even by the voluntary act of the party claiming the exemption and the benefit of the stipulation, it will be available to him in the absence of fraud or mala fides." Again, that court says, "Provision was intended to be made against the result of the strikes, but not against their occurrence," and then goes on to define a "strike,"

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within the meaning of the excepted clause: "A strike is a combination among laborers—those employed by others—to compel an increase in wages, a change in the hours of labor, some change in the mode and manner of conducting business, to enforce some particular policy in the character or number of men employed, or the like." "They can always be prevented or arrested, whatever be their origin, by a yielding on the part of the employers to the demands of the combination; and if such were the duty of the plaintiff, under the stipulation to make every effort that the contract with the defendant might be performed, the clause providing for an indemnity from the consequences of a strike was nugatory, and had no meaning. There could be no strike for which the plaintiff would not be responsible, in a way to deprive it of the benefit of the exemption from liability." Again: "The plaintiff acted in good faith in fixing wages of its employés, and upon just and reasonable business principles, and it is in no respect liable to the defendant for the result."

These principles apply with equal force to the case under consideration. The respondents, in insisting upon the change in custom, did so from what apparently seems to be sound business principles, in good faith, and with a view to place their business and that of the port upon an equal footing with that of other ports; and the refusal of the association and combination to yield cannot be attributable to them, and clearly falls within the meaning and intent of the exception on account of strikes. Other days for which exemption is claimed are classed with those for which a decree was directed to be entered in the case of Wood v. Keyser, heretofore decided; and for days lost, over the stipulated lay days, for these reasons, a decree may be entered in this cause.

J. P. Kirlin and John Eagan, for Hawkhurst S. S. Co.
John C. Avery, for W. S. Keyser & Co.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PER CURIAM. The questions raised on this appeal and cross appeal were elaborately considered by the district judge. His written opinion is found in the transcript, as well as reported in 84 Fed. 693; and, as we concur in the conclusions reached by him, the decree appealed from is affirmed.

(87 Fed. 1005.)

In re HIRSCH.

(Circuit Court of Appeals, Second Circuit. March 2, 1898.)

No. 68.

EVIDENCE—PRODUCTION OF DOCUMENTS—INTERNAL REVENUE COLLECTOR.

An internal revenue collector is not justified in refusing to produce, in obedience to a subpœna duces tecum issued by a state court, the application or return made by a person who desires to pay the tax imposed by the statutes of the United States upon persons engaging in the retail liquor business either by the nature of such documents or by alleged instructions from the commissioner of internal revenue not to produce such papers for use in evidence in the state courts.

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Appeal from the Circuit Court of the United States for the District of Connecticut.

This was a petition for a writ of habeas corpus by Heyman J. Hirsch, deputy internal revenue collector, who was committed by a state court of Connecticut for a refusal to produce to such court, in obedience to a subpœna duces tecum, an original application or return of a special taxpayer, to be used as evidence on the prosecution of such taxpayer for selling liquor in violation of the state laws. The writ was discharged by the circuit court on the hearing, and the petitioner appeals. The opinion filed below, and here reprinted from 74 Fed. 928, was in full as follows:

SHIPMAN, Circuit Judge. The petitioner, Heyman J. Hirsch, filed, on May 14, 1896, in the circuit court of the United States for the district of Connecticut, a petition, addressed to one of the judges of the circuit court, for a writ of habeas corpus to the sheriff of the county of Windham, in the state of Connecticut. The petition was signed by the petitioner, and was verified by his oath. A writ of habeas corpus was issued accordingly, the sheriff brought the petitioner into court, and he was admitted to bail. The sheriff thereafter made his return to the writ, stating, as the cause of the petitioner's detention and imprisonment, that he was committed to the Windham county jail by virtue of a mittimus, dated May 13, 1896, a copy of which was annexed to the return, and issued by authority of the superior court of the state of Connecticut, in and for the county of Windham, and then in session.

Testimony having been offered in support both of the petition and of the sheriff's return, the following facts were ascertained: On May 11, 1896, a criminal information was pending and on the eve of trial in the superior court of the state of Connecticut for the county of Windham, against Stephen H. Cole, of Putnam, in said county, for keeping intoxicating liquors on a named day, with intent to sell the same unlawfully, in said Putnam, and without a license therefor; the sale of intoxicating liquors not being lawful or permitted in said town, at said time, by the statutes of the state of Connecticut. On said day a subpœna duces tecum was issued by the proper authority who was duly empowered to issue the same, directed to H. J. Hirsch, deputy United States internal revenue collector, residing in Norwich, in the county of New London, and commanding him to appear before said superior court on May 12th, to testify his knowledge in said criminal cause, and to bring with him any and all papers, applications, or books in his possession showing that said Cole had paid a tax to the United States, or received a license from the United States for the sale in Putnam of spirituous or intoxicating liquor for the years 1895 and 1896, or any portion of said years. In accordance with the usages of the internal revenue department, a retail liquor dealer who desires to pay the special tax imposed by the statutes of the United States upon a person in that business makes a written return to the revenue collector in his district, which declares his intention to sell distilled spirits as a retailer for a specified time, and declares his

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payment of the tax; and it has been decided by the court of last resort in the state of Connecticut that such a return, with the payment of a tax thereon, is admissible evidence of an intent to sell intoxicating liquor, upon the trial of an information for an intent to sell unlawfully against the person who makes and signs the return. State v. Teahan, 50 Conn. 92. The states of Connecticut and Rhode Island constitute an internal revenue district, and Mr. John C. Byxbee has been, during the years 1895 and 1896, the collector for said district, with his main office in Hartford. The counties of New London and Windham, and a part of Tolland county, constitute a subdistrict, of which Heyman J. Hirsch is the deputy collector, his office being at Norwich, and to him the retail liquor dealers residing in his district make and have made the described returns, which are first forwarded to the Hartford office and then are returned and kept on file in the Norwich office. The subpœna having been duly served upon Hirsch on May 11th by a deputy sheriff for the county of New London, Hirsch appeared and became a witness before the court upon the trial of said information on May 13th, and informed the court that he had some of the papers called for in the subpœna; that the statement by Cole of his intention to sell intoxicating liquor in Putnam was, if made, in his office; that he declined to produce any papers which showed anything on the part of Cole with relation to the declaration of his intention or the payment of a tax as a liquor dealer to the United States; and, upon being informed by the court that he must comply with the subpœna or be committed for contempt of court, refused to do so, upon the ground that he was acting under instructions. He was thereupon committed for contempt, and the mittimus truly recites that he had in his possession, in his office, at Norwich, Conn., "the papers, applications, and books referred to in the subpœna aforesaid, and some of them relative to the matter referred to and named in the subpœna, but neglected and refused, and still neglects and refuses, to produce said papers, applications, or books, * * * in obedience to the order of the court to produce the same, or stand committed until he shall have complied with said order."

The petition for the writ was brought solely by virtue of section 753 of the Revised Statutes. The district attorney who brought the petition rightly deemed that section 643 was not applicable. Section 753 provides that the writ of habeas corpus, which the courts of the United States have power to issue, extends to a prisoner in jail, when he is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof. If the petitioner's refusal was not justified by a law of the United States, this court is without jurisdiction. He did not act, in his refusal, under an express statute of the United States, but under what is alleged to be a rule or regulation of the commissioner of internal revenue, and having the force of law.

Before considering the character of this rule or regulation, a brief recurrence to the principles or established usages respecting the production in court of official records, registers, or books kept for use by public officers, or detached documents of a public nature as

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evidence, may be desirable. Prof. Greenleaf, speaking of the admissibility of official books or registers, says, in substance (1 Greenl. Ev. § 484):

> They "therefore are recognized by law, because they are required by law to be kept, because the entries in them are of public interest and notoriety, and because they are made under the sanction of an oath of office, or, at least, under that of official duty. They belong to a particular custody, from which they are not usually taken out but by special authority, granted only in cases where inspection of the book itself is necessary, for the purpose of identifying the book or the handwriting, or of determining some question arising upon the original entry, or of correcting an error which has been duly ascertained. Books of this public nature, being themselves evidence, when produced, their contents may be proved by an immediate copy, duly verified."

Books of assessment of public rates and taxes are of this description. He further says (section 485):

> "When the books themselves are produced, they are received as evidence, without further attestation. But they must be accompanied by proof that they come from the proper repository. Where the proof is by a copy, an examined copy, duly made and sworn to by any competent witness, is always admissible. Whether a copy, certified by the officer having legal custody of the book or document, he not being specially appointed by law to furnish copies, is admissible, has been doubted; but, though there are decisions against the admissibility, yet the weight of authority seems to have established the rule that a copy given by a public officer whose duty it is to keep the original ought to be received in evidence."

It is to be observed that the question of the production or the admissibility of books or registers was not actually in this case. That which was known to be wanted was the paper signed by Cole, sometimes called "a return" and sometimes called "an application," which declared his intention to be a retail liquor dealer, and the payment of the tax. These applications are not of a private or secret character, because, under section 3240 of the Revised Statutes, each collector of internal revenue is required to keep conspicuously in his office, for public inspection, an alphabetical list of all persons who shall have paid special taxes within his district, and to state therein the time, place, and business for which such special taxes have been paid. It is further to be observed that the original paper, rather than a copy, was or might be needful in order to identify and prove the signature of Cole, and, furthermore, that, inasmuch as Hirsch declined to produce any papers or applications, the court was not called upon to ascertain whether books—that is, volumes—or only copies of parts of books were needed. The question at issue, therefore, relates to the refusal of Hirsch to produce, in obedience to the order of the court, any paper in his possession as deputy collector pertaining to the intention or the fulfillment of the intention of Cole to be a retail liquor dealer.

The foundation of the petitioner's case is an alleged rule or regulation of the commissioner of internal revenue prohibiting the collectors to produce in state courts any papers or documents relating to the business of the taxpayer, upon prosecutions for violations of state laws in regard to the sale of intoxicating liquor, against those who have paid a special tax. Section 321 of the Revised Statutes directs the commissioner, under the direction of the secretary of the treasury, to prepare and distribute all the instructions, regulations,

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directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue. Section 251 authorizes the secretary of the treasury to prescribe rules and regulations, not inconsistent with law, to be used under and in the execution and enforcement of the various provisions of the revenue laws. Regulations made by the head of one of the departments of the government, in pursuance of a statute authorizing them to be made, have the force of law over those to be affected thereby. The regulations of the navy and the army regulations are illustrations of this class of rules. U. S. v. Eliason, 16 Pet. 291; Gratiot v. U. S., 4 How. 80. No regulation upon the subject now under examination is contained in the printed book of general regulations which has been issued for the guidance of internal revenue officers. Such general regulation, if it had been made, would not seem to be in harmony with the principle of internal revenue legislation, that the payment of the taxes which it imposes affords no immunity from punishment for violation of a law of the state prohibiting the sale of distilled liquors. The government of the United States does not undertake to interfere with the statutory system of a state for the protection of its citizens against the unlicensed sale of intoxicating liquor. License Tax Cases, 5 Wall. 462; Pervear v. Massachusetts, Id. 475.

Section 3243 of the Revised Statutes, which was passed in 1866, for the purpose of fully declaring this principle is as follows:

"The payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any state for carrying on the same within such state, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such state or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any state from placing a duty or tax on the same trade or business, for state or other purposes."

The commissioner of internal revenue has, in two known instances, by letters addressed to two collectors, advised them of his views upon some branches of this subject. The first letter, dated December 31, 1887, was addressed to Mr. Alexander Troup, the collector for the district of Connecticut, in which the acting commissioner said, in reply to Mr. Troup's request for instructions:

"It is no part of your duty under the law to certify that a copy of your alphabetical list of special tax papers, made by these prosecuting agents, for other purposes than those contemplated by the internal revenue laws of the United States, is correct and true."

The next letter, dated March 31, 1888, was sent by the commissioner to Mr. Calvin Page, collector at Portsmouth, N. H., and was published in 34 Int. Rev. Rec. 261. It advises or directs him to respond to subpœnas of the state court, but to decline to produce the alphabetical list or the returns on form 11 for use on the trial of persons indicted for selling distilled spirits contrary to the state laws. The commissioner was of opinion that a state court had no legal right to compel the production of the records in question, and that the communications of the taxpayers were privileged, and were for revenue purposes alone, and should not be admitted in evidence.

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This letter and others of like character, which may be presumed to exist, are not the regulations in regard to the assessment of the internal revenue which have the force of a statute. They express the views of an officer of the government upon the power of the state courts, and upon the propriety of admitting this class of testimony in cases of prosecution for the violation of state laws; and, while they are entitled to respectful consideration, they neither authoritatively declare general principles, nor establish general rules in regard to the subject of obedience to the orders of a court in the matter of evidence. They are not general regulations, but are instructions based upon the commissioner's legal opinion of the powers of a court in a particular class of cases.

But it is not intended to take too narrow a view of the language of the habeas corpus section (Rev. St. § 753), and to insist that the act must be done or omitted in pursuance of a statute or written regulation, or publicly declared decision, because the word "law" has, in certain cases, a wider signification. The supreme court, when discussing the right of a court of the United States to extend the benefit of a writ of habeas corpus to a deputy marshal, imprisoned in a state court for an act done in protecting the life of a judge of a court of the United States who was engaged in the discharge of his official duty, said:

"In the view we take of the constitution of the United States, any obligation fairly and properly inferable from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is 'a law,' within the meaning of this phrase." In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658.

It may be said that the duty naturally devolves upon the commissioner of internal revenue to protect from inspection, and to preserve and to control the use of, the papers or documents of the United States, and that section 161 of the Revised Statutes recognizes this duty by authorizing the head of each department to prescribe regulations, not inconsistent with law, for the custody, use, and preservation of the records, papers, and property belonging to it, and that the refusal of Hirsch was in pursuance of this obligation, and was therefore in pursuance of law. It has already been stated that no duty of protecting this class of papers from the knowledge of the public devolved upon the internal revenue bureau, because section 3240 expressly provides that an alphabetical list of special taxpayers, with the business of each, shall be publicly exhibited. The natural duty to preserve and to control the use of documents of the bureau does not mean such a control as to keep this class of papers beyond the reach of the courts of the country; for, if there is nothing in them which the taxpayer has a right to demand should be secret, or which can injure the public welfare or interest, the fact that they are papers of the United States does not make them superior to the ordinary means provided by law for the production of private and public papers for use in courts.

Inasmuch as it may be well to look at the validity of the reasons for the commissioner's instructions, turning, first, to the subject of the power of courts in this regard, there is no distinction between

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the power of a state court and of a federal court to obtain the production of this class of testimony. Cases of a civil nature may naturally arise in the courts of the United States in which it is important to prove that one of the parties intended to occupy and did occupy a certain shop on a certain street during a specified period, and his written declaration to that effect, verified by his signature, and perhaps by his oath, may be important to aid in proving the desired fact. If the legal position upon which the second letter of the commissioner was based in regard to the power of a state court is correct, such evidence in a civil case before any court is to be prohibited; and if the papers in an internal revenue office with respect to applications for the sale of intoxicating liquors are rightfully inaccessible, the same must be true in regard to papers with respect to the sales of tobacco, cigars, cigarettes, and oleomargarine.

Upon the subject of power generally in courts of common law to compel by subpœna duces tecum the production of written papers to be used as evidence, the question with respect to both private and public or official documents was carefully considered, and was settled by the judges of the court of king's bench in 1808, who decided that such power existed, that a subpœna was the proper method, and who, speaking by Lord Ellenborough, said that:

"The right to resort to means competent to compel the production of written as well as oral testimony seems essential to the very existence and constitution of a court of common law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them." Amey v. Long, 9 East, 472.

The court intended to assert the general power, but took occasion to say that exceptional cases would arise where it would not be enforced, as, for instance, that a witness would not be compelled to produce papers which he obtained confidentially as counsel or attorney. King v. Dixon, 3 Burrows, 1687; Miles v. Dawson, 1 Esp. 405; Bateson v. Hartsink, 4 Esp. 43.

The question, then, becomes one, not of power generally, but whether this class of evidence has any special immunity peculiar to itself, or whether the officers of the revenue have a special reason for exemption as witnesses. An indefinite idea exists that there is an unfairness in being a vehicle by means of which this evidence is obtained; but there can be no implied obligation upon the government, because it has received a special tax from an offender against the laws of the state, to shield him from the consequences of his act. Such an idea is at variance with the statutes and the decisions of the supreme court.

It is next said that these returns are privileged. It is probable that a statute could declare that communications of taxpayers to a board of assessors or officers of a similar character should be privileged, and that no returns can be examined by any one, or be reached for examination by legal process. The thirty-fourth section of the act of August 27, 1894, which endeavored to make income tax returns entirely free from examination or inspection by unauthorized persons, did not go so far as to say that they could not be subject to examination by courts, but declared their freedom from

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examination "except as provided by law." In the absence of such provisions the returns now in question are no more privileged than other taxpayers' returns, in the sense that they must be kept secret, and cannot be produced for the purpose of evidence in a legal proceeding by order of court.

The remaining objection is that the officers may be subjected to inconveniences and to interruption in the discharge of their official duties. It is undoubtedly true that such occasional inconvenience will take place; but, so far as objections from this cause are concerned, the obligations of the officers of the internal revenue department, in regard to conformity with the requirements of a court for the production of books and papers, are much like the obligations of the members of a large mercantile firm or the officers of a business corporation. Individuals are compelled to furnish this class of evidence in cases in which they have no interest; and, though the officers of corporations have urged the inconvenience of being compelled to carry their books into court for the benefit of others, such an objection has not prevailed in the federal courts. "It may be inconvenient, and sometimes embarrassing, to the manager of a corporation to require its books and papers to be taken from its office and exhibited to third persons, but it is also inconvenient and often onerous to individuals to require them to do the same thing. Considerations of inconveniences must give way to the paramount right of litigants to resort to evidence which it may be in the power of witnesses to produce, and without which grave interests might be jeoparded, and the administration of justice thwarted." Wertheim v. Trust Co.,15 Fed. 716. As a matter of course, a court will exercise its sound discretion with reference to the necessities of the case, and will not ordinarily compel the detention of books which are in daily use, or compel public officers to bring public documents into court when the production of copies will equally answer the purpose. Corbett v. Gibson, 16 Blatchf. 334, Fed. Cas. No. 3,221; Delaney v. Regulators of City of Philadelphia, 1 Yeates, 403.

The point was made by the petitioner that he did not have the legal control of the papers, which were in the legal control of the collector for the district; and the case of Bank v. Hillard, 5 Cow. 158, was cited, in which it was held that the clerk of a banking corporation was not bound to produce its books, upon a subpœna duces tecum, the cashier being the proper custodian. In this case the collector's office was at Hartford, while the petitioner's office was at Norwich, where the papers were actually kept and were in his actual custody. It is not necessary to serve a subpœna upon the person who is merely technically in control, but who is not in the town, and not in charge of the office where the papers are actually kept. The person in actual possession, as the head of the office where the papers are kept, should produce them. Corsen v. Dubois, 1 Holt, 239; Amey v. Long, 1 Camp. 17.

The writ of habeas corpus is dismissed.

Charles W. Comstock, U. S. Atty., for appellant.
John L. Hunter, for appellee.

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Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. We concur in the opinion of the circuit judge dismissing the writ of habeas corpus, and therefore affirm the order appealed from. We do not, however, intend to decide that the writ of habeas corpus is the proper remedy to secure a review of the judgment of the state court in punishing a witness for disobedience of its process of subpœna ad testificandum. See Ex parte Parks, 93 U. S. 18; In re Wood, 140 U. S. 278, 11 Sup. Ct. 738; In re Frederich, 149 U. S. 70, 13 Sup. Ct. 793; In re Tyler, 149 U. S. 180, 13 Sup. Ct. 785; Ex parte Crouch, 112 U. S. 178, 5 Sup. Ct. 96.

(87 Fed. 1007.)

WOOD et al. v. KEYSER et al.

KEYSER et al. v. WOOD et al.

(Circuit Court of Appeals, Fifth Circuit. May 24, 1898.)

No. 654.

1. DEMURRAGE—EXCEPTIONS IN CHARTER PARTY—STRIKES.
   The term "strike," contained among the exceptions as to the running of lay days stipulated for in a charter party, should be accepted in its ordinary sense, as meaning that the charterers should be excused for any delay occasioned by a refusal of all the available workmen to work except charterers should pay an advance in wages made or demanded in the midst of the loading of a vessel, after the contract of the charterers and owners had been made upon the basis of wages formerly paid.
2. SAME—LAY DAYS.
   Days lost in putting up the gear of a vessel, preparatory to taking her cargo, being, under the terms of the charter party, a part of the duty of the merchant, should be included in the running of the lay days.
3. SAME—WORKING DAYS.
   Where, by the custom of a port, baymen stop work upon the day of the funeral of one of their deceased members, and also where they stop work on days which are not legal holidays, but which they desire to commemorate thereby, no allowance should be made therefor out of the days stipulated as lay days, as the term "working days" includes all days except Sundays and legal holidays; and, as these days cannot be excepted under any other provision of the charter party, they should be computed in the running of lay days.

Appeal and Cross Appeal from the District Court of the United States for the Northern District of Florida.

This was a libel in personam by owners against charterers to recover demurrage. There was a decree below for libelants, for part of their claims, and both parties have appealed. The opinion filed below, and here reprinted from 84 Fed. 688, was in full as follows:

SWAYNE, District Judge. This is an action by the owners of the British steamship Daybreak against the charterers to recover demurrage for the detention of the said vessel at Pensacola, the loading port, for 13 days in excess of the 14 working days allowed in the charter party for the furnishing of the cargo. The libel alleges the ownership of the steamship by the libelants, the making of the charter party, and

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that the vessel proceeded to Pensacola, and on the 31st day of March, 1896, gave notice of readiness to receive cargo, but shipment was not completed within the time fixed, but was delayed for a period of 14 days, for which libelants claim the stipulated demurrage, with interest thereon from April 20, 1896, to the date of the payment thereof. Respondents filed an answer, in which they admitted making the said charter party, but set up conditions which they alleged to amount to a strike among the baymen who were engaged in the loading of vessels in the port of Pensacola, preventing the loading of the vessel within the days allowed by charter party. The parties, by their proctors, filed stipulations to take the place of testimony. On said libel, answer, and testimony, the cause was submitted for final hearing. The charter party was for a full cargo of sawn timber, deals or boards, at merchants' option, for a port in Europe. From the record it is shown that a mixed cargo from charterers was placed as cargo. Among the conditions of the said charter party was the following:

"The act of God, * * * floods, droughts, * * * riots, strikes, or stoppage of labor, collisions, stranding, * * * or any other extraordinary occurrence beyond the control of either party," were always mutually excepted.

It further provided that lay days should commence the day after the vessel was ready to receive cargo, and notice given thereof, but that days for discharging should be according to the custom of the port of discharge, and continued:

"In the computation of the days allowed for delivering and receiving the cargo shall be excluded any time lost by reason of fire, droughts, floods, storms, strikes, lockouts, combinations of workmen, or any extraordinary occurrence beyond the control of the charterers or the receivers of the cargo."

The cargo was to be delivered to the vessel alongside, "and within the reach of ship's tackle," and up to that time to "be at merchants' risk and expense," and to be received by the master, and secured by the ship's dogs and chains, when so delivered, and then to be at ship's risk. It also provided, "Charterers or their agents to appoint and pay a stevedore to do the loading and stowing of the cargo under the supervision of the master," to supply dogs and chains, and to pay all port charges, at $2 per load of 50 cubic feet on cargo loaded; owner having a lien on cargo for freight, dead freight, and demurrage. The cessor clause in the charter party was expressly waived before the vessel sailed, and it was agreed that the matters in dispute in this cause might be decided in an action in admiralty or at law. Respondents admit the delay, but set up as an excuse that certain days were stormy, and that on other days the workmen would not work, on account of a funeral of one of their number. But the principal cause of delay, and the main question of contention in this and the other cases submitted herewith, is the allegation that there was a strike among the workmen who were expected to load the cargo; and therefore the charterers claim exemption from damages for delay, under the clause of the charter party which provides that:

"In the computation of the days allowed for delivering and receiving the cargo shall be excluded any time lost by reason of fire, droughts, floods, storms, strikes, lockouts, combinations of workmen, or any extraordinary occurrence beyond the control of the charterers."

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It is vigorously contended in this case, on the part of the charterers, that the strike which existed at the time the loading was taking place was such a strike as was intended by the parties to the contract to cover at the time it was signed, and therefore the charterers should not be liable for delay caused thereby. Upon the other hand, the libelants maintain that the expression in clause 9, "beyond the control of the charterers," means that if it were possible for the charterers to yield to the demand of the strikers, by an increase of wages, and they could have, under these circumstances, loaded the vessel, then the strike was not "beyond the control" of the charterers, and they are not entitled to exemption for demurrage. The libelants further contend that where the time for loading a vessel is fixed definitely in the charter party, so that it can be calculated beforehand, the charterer thereby agrees absolutely to load her within the prescribed time, and he takes the risk of all unforeseen circumstances; and the principal case they cite to maintain this contention is that of Brown v. Certain Tons of Coal, in 34 Fed. 913, in which Severens, J., speaking of the subject of strikes, and the effect upon the delay of a vessel, says:

"He refused to pay—whether justly or unjustly, I do not know—the price that was charged by the laborers in that vicinity for unloading a vessel. He higgled over a little difference of 10 cents an hour to those employés, and permitted the vessel to lie there until he could coerce the employés to accept 40 cents instead of 50 cents an hour; thereby attempting to save to himself a pittance, while subjecting the other parties to serious loss and damage. It is therefore held in this case, as a matter of fact, that the consignee did not use reasonable care and diligence."

Sanborn, Circuit Judge, in Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co., 23 C. C. A. 564, 77 Fed. 919, referring to the same difference in wages between employer and employés in the matter of strikes, says:

"The suggestion that the Reading Company might have resumed operations earlier by hiring men who had discharged themselves at the rate of 50 cents instead of 40 cents an hour, and by agreeing not to prefer other workmen as employés, is not entitled to extended consideration. The market rate of wages for men of this class was 40 cents an hour. That was the rate at which the strikers worked without complaint until they abandoned their employment. That was the rate at which the new employés were paid. To exercise all reasonable diligence does not require an employer to hire, at wages 25 per cent. above the market rate, a set of men who have abandoned its employment without warning, at a critical time in the conduct of its operations, and banded themselves together to prevent, by intimidation and violence, other workmen from carrying on its legitimate business. Nor does it require such employer to agree not to prefer, or not to prefer in fact, faithful and willing laborers at going wages, as its employés, to those who have acted in this way, at wages 25 per cent. higher." And then the learned judge adds: "There is nothing in Brown v. Certain Tons of Coal, 34 Fed. 913, in conflict with these views."

This decision by Sanborn, Circuit Judge, is not only one of the very latest (having been delivered in August, 1896), but is one of the best-considered, cases cited, and contains many valuable references. There is much in it to sustain the proposition in libelants' brief, that if the charterers could, by any reasonable effort, have avoided the strike, or secured other laborers with which to load the vessel, then they would be liable. On page 7 of the brief of Convers & Kirlin,

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they say that the charterers must secure workmen if it were possible to get them at reasonable terms, and if those whose services they had, or expected to have, refused to work for them on reasonable terms, they must secure others, if possible. The court apprehends that this is the proper construction that should be put upon the clause in question in this case. In the case above referred to, Sanborn, Circuit Judge, on page 568, 23 C. C. A., and page 923, 77 Fed., speaking of the question of customary time, or usual time, as compared with reasonable time, in that case, says:

"We have failed to find any decision among the cases cited by counsel for appellants to the effect that a custom of a port excludes other facts and circumstances from consideration in determining the reasonableness of the time of the boat's discharge, or of the diligence of the charterer. The decisions and opinions to which he referred amount to nothing more than this: That when a ship is to be unloaded, under ordinary circumstances, the customary method and the customary time in its port of delivery prove the reasonable method and the reasonable time, and measure the liability for detention, in the absence of countervailing evidence. But suppose that the circumstances are extraordinary; suppose that the threats of reckless men and the violence of mobs suspend the operation of every custom of a port, and hold willing laborers and anxious dock owners alike in enforced idleness and utter helplessness for days; is the customary time for the discharge of a vessel under ordinary circumstances the reasonable time under such circumstances? Shall the reasonableness of the time within which a charterer is required to unload a vessel under such circumstances be measured by a consideration of ordinary circumstances only, or by a consideration of all the actual facts and circumstances at the time he was required to unload her?" He adds: "It is not a new question. It has been carefully and exhaustively considered in the English and American courts,"—and cites a number of cases thereon.

All the American decisions show that, whether the custom of a port is proved or not, all the facts and circumstances, ordinary and extraordinary, which exist at the time of the unloading, have been uniformly considered in determining the reasonableness of the time of discharge. The American cases apply the same rules of law to these contracts, where the customary time of discharge is proven, that they do when no custom is established; and the test of the liability of the charterer for the delay is the reasonableness of the time occupied in unloading, in view of all the facts and circumstances at that time. Any other rule would contradict and destroy itself. It is settled that the obligation of the charterer is to load the ship in a reasonable time. Our reason teaches that that time is reasonable under ordinary circumstances (that is, customary), but is unreasonable under extraordinary circumstances. If extraordinary circumstances can never be considered to determine the reasonableness of the time, then the charterer must always unload all vessels that arrive under unusual circumstances in an unreasonable time. It is admitted by the stipulations filed in this case that the charterers were unable to obtain other labor than that of the strikers with which to load the vessel; and the court holds in this case that the demand that they should be compelled to pay an advance in wages, made in the midst of loading, after the contract between the charterers and the owners had been made upon the basis of the wages formerly paid, and a refusal to work unless the demand was acceded to immediately, was, in the estimate of the court, an unreasonable

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demand, and one which the charterers were not required to comply with, in carrying out the spirit and the intention of the parties to the contract at the time it was made. To say that the charterers could avoid the effect of the strike by granting the demands of the strikers and paying the additional wages, and thus save the vessel from damage and the charterers from liability, is to virtually nullify the purpose for which the clause was inserted in the charter party. If such were the law, and the charterers should promptly comply in every instance with the demand of the strikers, then there would never be a strike. If the clause does not mean protection to the charterers, under the circumstances in this case, then it has no meaning, and no reasonable interpretation can be put upon it. The court does not feel bound, and is not in any way inclined, to lend its power to aid a set of men to squeeze their employers into an unconscionable and unreasonable contract, made at a time of great necessity, and under the fear upon the part of the charterers that they will be mulcted in damages, as contended for by the libelants here, if they do not yield to their demands.

As to the other causes of delay, to wit, the funeral of the baymen, the day occupied in putting up the tackle for loading the vessel, and for cessation of work on Good Friday, it appears that these days do not fall within the exceptions of the charter party, as, properly speaking, they are "working days," which term includes all days except Sundays and legal holidays; and I am of the opinion that the custom of baymen to cease labor on these days, as set forth in the answer, is not such a stoppage of labor as was contemplated by the charter party. The day lost in putting up the gear of the ship should count in lay days, as it may reasonably be included in the work of stowing the vessel; it not being contended that it is part of the duty of the vessel to so fit herself, in order to fall within the terms of the charter party, "Lay days to commence on the day after the vessel is ready to receive cargo, and written notice of same given to charterers." It appears from the record that these matters were the custom of the port, of which the charterer, at the time of the making of the charter party, had full knowledge; and for the delay occasioned by such custom he was entitled to provide, and knew that they might be liable to occur. For the loss of days occurring from the last-mentioned causes, the charterers can plead neither ignorance nor surprise, and the court thinks that they should be held liable for damages for any time over lay days lost for these reasons.

J. P. Kirlin and John Eagan, for John Wood & Co.
John C. Avery, for W. S. Keyser & Co.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PER CURIAM. The questions raised on this appeal and cross appeal were elaborately considered by the district judge in his written opinion, as found in the transcript, and as reported in 84 Fed. 688; and, as we concur in the conclusions reached by him, the decree appealed from is affirmed.

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(88 Fed. 23.)

WEISS v. BETHLEHEM IRON CO.

(Circuit Court of Appeals, Third Circuit. June 13, 1898.)

No. 7.

1. TRIAL—MISLEADING INSTRUCTIONS.
   Instructions which, taken as a whole, are calculated to mislead the jury as to the character of the evidence necessary to prove the issue on one side. are erroneous.

2. SAME—FAILURE TO SUBMIT MATERIAL EVIDENCE.
   Reversible error exists if the general effect of a charge tends to withdraw from the consideration of the jury material evidence, or fails to present with sufficient distinctness a material fact which may have a controlling effect.

3. SAME.
   It is error for the court to submit the evidence and theory of one party prominently and fully to the jury, and not call their attention to the main points of the opposite party's case.

4. MASTER AND SERVANT—PRIVATE RAILWAY—EMPLOYE CROSSING TRACK.
   The rule requiring a traveler on a highway to stop, look, and listen before crossing a railroad track, is not the criterion by which to determine the degree of care required by an employé about to cross a private railway operated as part of his employer's rolling-mill plant. In such case the employer is bound not to expose its servant, conducting its business, to unnecessary peril against which it might have guarded with reasonable diligence; and the servant has a right to assume that his employer will not subject him to needless danger. The servant is therefore bound only to observe reasonable care to avoid danger which is obvious, or which is known to him, or of which he might have acquired knowledge by the exercise of proper attention.

   Dallas, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Geo. Demming and M. Hampton Todd, for plaintiff in error.
John G. Johnson, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

ACHESON, Circuit Judge. This is an action brought by John Weiss against the Bethlehem Iron Company to recover damages for bodily injuries alleged to have been sustained by the plaintiff by reason of the negligence of the defendant. The plaintiff went into the employment of the defendant company at its steel works on the evening of April 27, 1896. He worked at night from 6 o'clock in the evening to 6 o'clock in the morning, and his duties were to wheel fire brick and clay in a wheel barrow to a place in the defendant's mill, where new furnaces were in course of erection, and to wheel therefrom old fire brick, and dump them at a refuse pile in the defendant's adjoining mold yard. While engaged in this latter work, shortly after 9 o'clock on the night of April 30, 1896,—the fourth night of his employment,—the plaintiff was struck by a moving car

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which crossed his pathway, and was badly maimed, under the circumstances and in the manner about to be related. In wheeling away the old fire brick in his barrow, the plaintiff pursued, as he was directed to do, a wheelbarrow runway which passed through an opening in the wall of the mill out into the mold yard, and proceeded through the yard to a right angle of the wall of the mill, and thence, turning to the left on a line parallel with the wall, and a few feet distant therefrom, to the refuse pile. The last-mentioned part of this wheelbarrow runway at one point crossed a narrow-gauge railway track, 2½ feet wide, upon which ran a "dinkey engine" and its "buggies" (a small locomotive and small cars), used in transporting molds from and into the mill. In coming out of the mill into the mold yard, this dinkey engine and its cars emerged through a doorway in the wall, which doorway was 11 feet, less 4 inches, wide. The distance from the outside of the wall to the middle of the wheelbarrow runway crossing was 7 feet. Immediately inside the doorway, within the mill, the railway track made a sharp curve, so that a person standing in the middle of the wheelbarrow crossing and looking into the mill through the doorway could see along the railway track only the distance of 19½ feet. Therefore, if the head of the engine were on the track inside the doorway, and 12½ feet distant therefrom, it would be invisible to a person at the wheelbarrow crossing under all circumstances. The dinkey engine was 19 feet long, and the length of one of its buggies or cars was 11½ feet. In coming out of the mill through the doorway, the engine sometimes pulled a car, and sometimes pushed a car ahead. Its ordinary rate of speed was from four to six miles an hour. Its usual signal before it emerged outside was its whistle, sounded a short distance—about 25 feet—inside the mill as it came around the curve already mentioned towards the doorway. Usually, however, there were three dinkey engines in constant use in the mill at the same time, moving upon several narrow-gauge railway tracks laid in various directions through the mill; and these three engines, it was testified, were giving signal whistles every few minutes all day and all night. A disinterested witness (Julien), speaking of these moving dinkey engines, said: "They always whistle; they are always going; never stop." It also appeared that there were several stationary engines in the mill near this locomotive doorway, whose whistles were sounding from time to time, and that other loud noises at that place were constantly made by the Bessemer blowers and otherwise. The plaintiff was 31 years of age. He was a German, who had only been in this country a few months before he went into the defendant's service. He had not previously worked in such an establishment, and had never been in the defendant's works before his hiring.

There was evidence tending to show that it was a rule at the defendant's works for the foreman to warn new men in regard to the danger from locomotives, but that no such warning was given to the plaintiff. The defendant's general foreman, Charles G. Barnes, who hired the plaintiff, testified: "As a rule, I generally caution the men about the tracks to be crossed, and the locomotive coming out on the tracks; but I don't know whether I told him [plaintiff] or not.

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I know I told the foreman of the bottom makers to tell him about it; to take him out and show him the tracks." It was not shown that any one had given such caution to the plaintiff. To the contrary, speaking of the dinkey engine which came out of the doorway into the mold yard and crossed the wheelbarrow runway, the plaintiff testified, "No one told me anything about that locomotive." The plaintiff testified that during each of the three nights he had worked before the night on which he was hurt he had wheeled six loads of old fire brick to the refuse pile, and, counting both his goings and returns, had thus crossed the railway track 12 times each of these three nights. He had wheeled, it seems, three loads on the fourth night before the trip on which the accident occurred. Thus, as he stated, he had crossed the track with his wheelbarrow altogether 42 times, computing both his going and returning. The plaintiff testified that only on one occasion had he seen the locomotive come out of the doorway into the mold yard, and this on the first or second night of his service; and that on that occasion a man came to the doorway, looked out, and beckoned with his hand for the engine to come on, and that this man came out, and the engine followed him. No part of this testimony was contradicted. In one particular it was corroborated, as we shall more fully see hereafter.

On the occasion when the plaintiff was run down, the locomotive, it would seem, was moving at its usual speed, and blew its usual signal whistle inside the mill at the customary place, but no other precaution was observed. The engine was pushing a car ahead. The car was loaded with molds, which, it was testified, would show a "cherry red" in the dark. There was no light on the car, nor was any person on it. The engineer, speaking of the plaintiff, testified, "I couldn't see him; there were molds on the top of the buggy." Presumably, then, the plaintiff could not see the engineer or the head of the engine. In the mold yard there was an electric arc light perhaps 150 feet from the crossing. As to the effectiveness of this light at the place of the accident there was some conflict of evidence.

With reference to the accident the plaintiff testified in substance as follows: That as he approached near to the railway track, and before starting to cross it, he listened and looked, and he heard nothing and saw nothing; that he then went straight ahead, without stopping, and shoved his wheelbarrow over the track; that he himself had reached the middle of the railway track when he was struck by the car, and dragged by it seven or eight yards. In response to the question asked by the court, "Why did you do that [listen and look] if you had never seen an engine pass along that track but once in all your experience?" the plaintiff answered: "I looked and listened, and when that man came out before to see whether everything was right —that was the reason I looked and listened. I looked for the man to come." The plaintiff stated that while he was upon this trip, and after he had started from the mill, he heard the whistle of a locomotive inside, but that the locomotives were constantly whistling inside the mill as he passed along the wheelbarrow runway.

The counsel for the defendant insist "that as a matter of law the plaintiff, upon the evidence in this case, cannot recover." But this

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proposition is wholly inadmissible. The supreme court of the United States has declared that it is only when the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered one of law for the court. Railway Co. v. Ives, 144 U. S. 408, 417, 12 Sup. Ct. 679; Railway Co. v. Gentry, 163 U. S. 353, 365, 368, 16 Sup. Ct. 1104. And the court there made observations which we do well to bear in mind here:

"What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions of the court. It is their province to note the special circumstances and surroundings of such particular case, and then to say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs."

As was said in Railway Co. v. Gentry, supra, so we say of the present case that it was "one peculiarly for the jury under appropriate instructions as to the principles of law by which they were to be guided in reaching a conclusion." The evidence, we think, fairly justified a finding that the crossing at which the plaintiff was injured was a place of special danger. As we have seen, the wheelbarrow runway crossed the railway track in front of and only seven feet from a comparatively narrow doorway out of which a dinkey engine and its cars emerged. A sharp curvature of the railway track inside the doorway prevented a sight of an approaching locomotive or car until it was within 20 feet of the crossing. It was no unusual thing—as happened in the instance under investigation—for the engine to push ahead a car without outlook or light upon it. The only signal of approach usually given—and the one given on this occasion—was a whistle from the locomotive while it was inside the mill, and not visible from the crossing. There was evidence tending to show that the defendant's superintendent and foreman regarded this crossing as particularly dangerous, and that the habit was to warn new and inexperienced employés against this danger. The plaintiff testified that no such warning was given to him, and in this statement he was thoroughly corroborated. Under the evidence a finding that he was so cautioned could not have been sustained. The plaintiff was entirely inexperienced when he entered the defendant's service. This was known to the defendant's foreman when the plaintiff was hired. The plaintiff worked at night. He was injured in the early part of the fourth night of his service. He testified that only once had he seen the locomotive come out through this doorway, and that then a man came before, apparently to give warning of its approach.

Whether, with respect to evidence tending to establish the recited state of facts, the instructions which the court gave to the jury were appropriate and adequate, let us now consider. The court substantially affirmed the plaintiff's fourth point, which was to the effect that, if the jury found that the plaintiff had received no special instructions in regard to the mode in which the engine came out of the doorway, and his personal observation justly led him to believe that every time it came out some one preceded it to warn him and his fellow workmen off the track, and the plaintiff had no other reasonable way of better informing himself, the jury should find that the defendant failed

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in its duty to give him instructions; but, after so charging the court, immediately added:

"The plaintiff, in presenting his case through his counsel, has laid a good deal of stress on the position stated in the point just read to you, and if you render a verdict for him it is not at all improbable that it will be based upon this point. I therefore call your attention to the fact that the only evidence that the plaintiff had any justification for supposing the engine when it approached the crossing was preceded by a man to give warning is to be found in his own testimony, which is to the effect that upon the only occasion when he saw an engine come out of the doorway and approach the crossing it was preceded by such an individual. So that the fact upon which this point is predicated is testified to by the plaintiff alone. Now, if the case is put upon that point, you must bear in mind that the point is predicated and supported by the testimony of the plaintiff alone. That may be sufficient, if it satisfies your mind fully, in view of the other evidence, it is. But you must not overlook the fact that this is the testimony of the plaintiff; that he is interested to the extent of all involved here, and must remember that other witnesses who have been called, who are disinterested, and who spoke upon this subject, said that it was not the practice so to warn persons of the approach of an engine to that crossing; that they never knew it to be done in all their experience; that the method of giving such warning was by means of a whistle, and no other. It is for you to say whether this occurred as the plaintiff has testified, or whether he was mistaken respecting it."

The proposition embodied in the plaintiff's fourth point had a most important relation to the case. The court, indeed, went so far as to say to the jury that, if they rendered a verdict for the plaintiff, "it is not at all improbable that it will be based upon this point." It was, therefore, a matter of great moment to the plaintiff that the instructions of the court should be accurate. The plaintiff's statement as to what he saw on the first or second night of his service in respect to a man preceding the locomotive as it issued through the doorway was circumstantial. It was either a truthful statement or a fabrication. If true, it was a great fact in the case, to which the jury should have given the most serious consideration in connection with the evidence bearing upon the defendant's alleged neglect of duty to the plaintiff in failing to give him warning against a danger which was not obvious. As we have seen, the court said that "the point is predicated and supported by the testimony of the plaintiff alone," and that he was "interested to the extent of all involved here," and that other witnesses "who are disinterested," and who had spoken upon this subject, said "that it was not the practice so to warn persons of the approach of the engine to that crossing; that they never knew it to be done in all their experience; that the method of giving such warning was by means of a whistle, and no other." Evidently these instructions were calculated to discredit the plaintiff with the jury. Now, in so charging the learned judge had overlooked the testimony of the brakeman (Julien), who, upon cross-examination by the defendant's counsel, had testified thus:

"Q. Had you ever known anybody to run ahead of the locomotive? A. When they are in there loading molds off the front of the foundry, the brakeman always walks out there. Q. Repeat that again. A. I say when there is molds come out of the foundry, and get put off at the other crane, the engine lays there at the dump empty, and the brakeman runs ahead."

This testimony, we think, tended to corroborate the plaintiff in his statement as to what he had observed. In view of this evidence, there

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certainly was error in the above instructions. Moreover, the erroneous statements of the court upon this subject were extremely hurtful to the plaintiff, and perhaps fatal to his case. The bill of exceptions, indeed, shows that in a supplemental charge to the jury the court, among other things, said:

"And you have been sent for to be informed that the plaintiff's counsel has called the attention of the court to a few lines of testimony of the witness Julien, called by him, which he desires you to hear read. I told you that I did not see any testimony corroborative of the plaintiff's statement that the only time he saw the engine leave the building and cross the track it was preceded by a man to ascertain whether the track was clear. The plaintiff's counsel thinks there is such corroboration in the lines which he will now read to you. [The lines were then read.] After reading, the court said, this testimony had not impressed it as it had the counsel, but that its effect and value was for the jury, to whom it was submitted."

Was this a sufficient correction of the error into which the court had fallen? We are constrained to answer negatively. The plaintiff was justly entitled to an unequivocal withdrawal of the previous erroneous statements of the court. The jury may well have understood that no retraction whatever was intended, but that the court adhered to the views it had previously expressed.

We now turn to the charge of the court upon the subject of the defendant's alleged negligence. Here it will be necessary for us to quote the major part of the instructions. We give all that are here material. The court said:

"In the case before us the plaintiff charges that the place where he was put to work was dangerous, and unnecessarily so. The only cause of danger pointed out which we are called upon to consider is that arising from the railroad crossing where he was injured. If any other cause of danger existed, it is not important, because it did not contribute to the injury. The precaution taken by the defendants to guard against danger at this crossing was the sounding of a whistle as the engine approached as notice of the approach. This is the usual signal adopted for such purpose. Unless, therefore, the circumstances existing at this crossing were such as to render this method of giving warning insufficient, you should find the defendants not to have been careless in this respect. I repeat: Unless the circumstances existing at this crossing were such as to render this method of signaling by whistling insufficient, you cannot properly find the defendants to have been careless in this respect. What else or more was it reasonable to expect or require of the defendants? You have heard the evidence on the subject,—a description of the situation and surrounding circumstances; you have heard the discussion of it by counsel on one side and on the other, and I will not dwell upon the question. Were the circumstances at this crossing such as to require any other signal than that established by the rules of the company? Was it insufficient? Does the evidence show it to have been insufficient? It is the usual signal, and, so far as appears, the universal signal at railroad crossings generally. Was there anything here to require a different signal, or an additional signal. To the court it seems that the sounding of the whistle was sufficient to render the crossing reasonably safe, with the exercise of proper care by the plaintiff, with knowledge on his part of the situation. The case, however, is submitted to you, and you have the responsibility of deciding it. Had the plaintiff knowledge of the situation, or was the defendant remiss in failing to impart such knowledge to him? You have heard the testimony on that subject,—his own and that of defendant's witnesses. He had been repeatedly over the route, back and forth, on which he worked. He had seen the railroad, and the engine and cars upon it, upon one occasion at least. Would or not his eyes of themselves inform him fully in respect to the situation? * * * With these observations, and in view of the very

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thorough discussion of the subject by counsel, I submit to you the question, were the defendants guilty of negligence in the respects stated as complained of; that is, in not providing for safety at that crossing, or by withholding, or failing to give proper information respecting the method of operating the cars upon the road at that point? I feel it to be my duty to say to you that I do not think the evidence justifies a conclusion that the defendants failed in their duty in this particular. I do not take the question from you. I submit it to you. The responsibility will be upon you of deciding it justly. But you ought not to reach a conclusion on the subject without exercise of great care and the best judgment you possess. You cannot undertake to say how an establishment like this shall be constructed, how its railroad shall be located, what will answer its purposes, and what will not. You have not the information necessary to enable you to form a reliable judgment. The real question here in this respect is whether or not proper warning was given to this man at that crossing, or whether he was misled respecting it for want of proper information. These are the questions, and the only questions, that the court sees, as respects this branch of the case; and I repeat what I have said, that in the judgment of the court the evidence on one side and the other, properly considered, does not justify a conclusion that the defendant omitted or failed in any part of its duty in this matter. I repeat, however, so that you will not misunderstand me, that the question is one of fact, which is submitted to you."

Touching these instructions, our first observation is that no reference is here made by the court to the highly important evidence tending to show that this crossing was considered by the defendant itself a place of peculiar danger, and that it was customary to give particular warning of that danger to new and inexperienced workmen. We find no allusion whatever to this evidence in any part of the charge. This omission is the more to be regretted because the proof was that the plaintiff had not been warned. Again, the attention of the jury was not here directed to the fact that the plaintiff was a new and inexperienced hand, whose term of service had been very brief, extending only into the fourth night. Indeed, the charge assumed that the plaintiff had acquired full knowledge by observation. Furthermore, the court made no mention in detail of the unusual facts relating to the crossing and the manner of its use, which we have recited. Yet, without close attention to the special circumstances, the jury could not rightly determine whether the defendant had acted with due prudence, and with reasonable regard to the safety of the plaintiff. In all these particulars we are obliged to say that the instructions of the court were incomplete and inadequate.

Then, again, the court, in effect, charged the jury that the defendant had performed its whole duty when it sounded a whistle in approaching the crossing, although the uncontradicted proof was that such signal was given when the locomotive was invisible to one approaching the crossing, and was given inside the mill, where other locomotives were continually giving like signals. In view of the exceptional facts, the instructions upon this point, we think, were too favorable to the defendant.

Still further, the court said: "You cannot undertake to say how an establishment like this shall be constructed, how its railroad shall be located, what will answer its purposes, and what will not. You have not the information necessary for you to form a reliable judgment." This instruction, it seems to us, was calculated to mislead the jury. It might not have misled a trained lawyer, but its effect on a

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jury might well be to unduly restrict legitimate inquiry. As we have already said, the determination of the facts of this case was peculiarly for the jury, and it was their province to consider all the circumstances and surroundings.

Instructions which, taken as a whole, are calculated to mislead the jury as to the character of the evidence necessary to prove the issue on one side, are erroneous. Rea v. Missouri, 17 Wall. 532, 543. Reversible error exists if the general effect of a charge tends to withdraw from the consideration of the jury material evidence. Hall v. Weare, 92 U. S. 728. If an instruction fails to present with sufficient distinction a material fact which may have a controlling effect, there is ground for reversal. Ayres v. Watson, 113 U. S. 594, 609, 5 Sup. Ct. 641. It is error for the court to submit the evidence and theory of one party prominently and fully to the jury and not call their attention to the main points of the opposite party's case. Canal Co. v. Harris, 101 Pa. St. 80; Reichenbach v. Ruddach, 127 Pa. St. 564, 595, 18 Atl. 432; Young v. Merkel, 163 Pa. St. 513, 520, 30 Atl. 196.

Upon the subject of alleged contributory negligence on the part of the plaintiff the court charged the jury as follows:

"Aside altogether from the questions whether the defendant was guilty of fault or negligence, could the plaintiff, by the exercise of such care as a man should exercise under such circumstances where there is danger, by the exercise of such care have seen or heard the engine? One of the witnesses called, who appears to be entirely disinterested,—though you will say how much confidence should be reposed in his testimony,—says that he saw the plaintiff approach the railroad on this occasion, saying that he saw him back some distance from the track, describing the situation. He says he heard the whistle of the engine, and knew that it was coming; that he watched the man come steadily on, apparently without looking, and certainly without stopping, passed directly on the track in front of the engine, and was struck. Now, is that so? If it is, there can be no question about his negligence. In a situation like that it was his duty to be on his guard. There is nothing in the case that excuses him from the exercise of proper care. If he did pass steadily on from the point where this witness saw him, as the witness says he did, without taking any precaution to guard himself against the danger of coming into collision with the engine, there cannot, in the judgment of the court, be any room for doubt that he was guilty of contributory negligence. He says that he stopped and looked and listened. It is for you to say whether that is the case. The witness to whom I refer says that he did not, and he is apparently disinterested. * * *"

We here note, first, that the court made an inadvertent mistake in saying that the plaintiff had testified that he had stopped before crossing the railway track. The plaintiff did not so testify, but stated the reverse. In consequence of this misapprehension, the court submitted to the jury a question of veracity as between the plaintiff and the witness Jacoby. No such issue, however, could be raised properly, for the supposed discrepancy in the testimony of the plaintiff and that of the other witness did not exist. But, aside altogether from this inaccurate statement, we are not able to concur in the views of the court upon the question of the plaintiff's alleged contributory negligence in not stopping before he attempted to cross the railway track. In substance and effect the court charged the jury that, if the plaintiff did not stop, he was guilty of contributory negligence. Now, the "stop, look, and listen" rule regulating the conduct of a traveler upon a highway when about

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to cross a railroad track is not the criterion by which to determine the degree of care which was incumbent upon the plaintiff. The difference between an ordinary railroad traversed by trains running at high rates of speed and the defendant's private railway in structure, equipment, location, and use is so great that the general rule governing the crossing of the former is not applicable to the latter. Again, the relation between the plaintiff and the defendant was very different from that which exists between a railroad company and a traveler upon a highway crossing the railroad. The defendant set the plaintiff to work upon its wheelbarrow runway, which crossed its railway track, and the plaintiff, in the performance of his work, necessarily crossed the railway, not upon the implied invitation of the defendant simply, but by its direction. The defendant was under a legal obligation not to expose its servant, when conducting its business, to unnecessary peril against which he might have been guarded by reasonable diligence on the part of the defendant. Hough v. Railway Co., 100 U. S. 213, 217. The plaintiff had a right to assume that the defendant would not subject him to needless danger, and hence his watchfulness would naturally be diminished. The plaintiff was bound only to observe reasonable care to avoid danger which was obvious, or which was known to him, or of which he might have acquired knowledge by the exercise of proper attention. Whether the plaintiff was guilty of contributory negligence was a question for the determination of the jury upon a consideration of the peculiar circumstances surrounding the case and in the light of all the evidence.

We find support for these views in the opinion of the supreme court of the United States in the recent case of Warner v. Railroad Co., 168 U. S. 339, 347, 18 Sup. Ct. 68, where it was held that the rule requiring a traveler upon a highway in crossing a railroad to stop and use his eyes and ears to ascertain whether a train is approaching did not apply to a person who was crossing a track at a station to get on a train. The court said that the person so crossing the railroad did so upon the implied invitation of the railroad company, and that, while such implied invitation would not absolve him from the duty to exercise care and caution in avoiding danger, "nevertheless it certainly would justify him in assuming that, in holding out the invitation to board the train, the corporation had not so arranged its business as to expose him to the hazard of danger to life and limb unless he exercised the very highest degree of care and caution." The court added that the railroad company, in giving the invitation, must be presumed to have taken into view the state of mind and of conduct which would be engendered by the invitation; and the court held that it was a question for the jury, under all the circumstances, whether the plaintiff's intestate was chargeable with contributory negligence.

The judgment is reversed, and the cause is remanded to the circuit court with direction to set aside the verdict and grant a new trial.

DALLAS, Circuit Judge, dissents.

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BRADFORD, District Judge (concurring). I fully concur in the conclusion reached by the presiding judge that the judgment below be reversed, the verdict set aside and a new trial granted. There is, however, one feature of the case not particularly dealt with in his opinion, which has impressed me with great force, and, as much as any other consideration, has convinced me that there was reversible error in the charge delivered to the jury in the court below. There was no evidence showing or tending to show that the defendant had, at or prior to the time the plaintiff was injured, either adopted or promulgated any rule requiring any person, at the time when a locomotive, with or without cars attached to it, was about to emerge from the defendant's mill and cross the wheelbarrow runway where the plaintiff was injured, to be stationed at the doorway or to precede the locomotive or cars in order to give warning to such persons as might be engaged in wheeling brick or other material along the runway path. The evidence does not disclose any such practice in relation to this subject as to permit a legitimate inference that such a rule existed; and the witnesses Tomaney and Julien testified that there was no such rule. Nor was there any evidence showing or tending to show the existence of any rule requiring a locomotive or car, about to pass from the mill and cross the runway, to stop at the doorway before proceeding further. The runway, together with other paths in the mould yard, was maintained by the defendant for the use of its operatives in performing the work for which they were employed. The doorway through which the car passed and struck the plaintiff was ten feet and eight inches wide in the clear. From the plane of the outside of the wall, where the doorway was situated, to a point in the middle of the runway as it crossed the narrow gauge railway track, was a distance of seven feet and one inch. The evidence shows that the rate of speed of locomotives emerging from the doorway and crossing the runway was from four to six miles an hour. If the speed of a locomotive or car coming out of the doorway be taken at an average of five miles an hour, the distance between the doorway and the center of the runway crossing would be traversed in less than one second. At the time the plaintiff was injured the locomotive came out of the doorway at its usual rate of speed. Wooley, the superintendent of the mill, testified that the locomotive, which came through the doorway at the time of the plaintiff's injury, was nineteen feet and four and one-half inches long, and that in his judgment, at the rate of speed at which such engines move, namely, from four to six miles an hour, they could be stopped in about their own length, and that that would be a very quick stop. He further testified to the effect that about the time the plaintiff was injured a locomotive would come out of and return through the doorway about seventy one times in the course of one night; that in the course of twenty-four hours about eight hundred crossings of the narrow gauge track where the plaintiff was injured were made by operatives of the defendant; and that nearly as many crossings were made at that point at night as in day time. He further testified: "Q. I have understood you to say, in answer to Mr. Demming, that there were new and old men among these men who wheel the barrows? A. Yes, sir. Q.

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Can you give any idea of the proportion you always have of new men on these jobs? A. I could hardly say that. There is hardly a day passes that we have not a new man or two or three or four." He further testified to the effect that it was the custom to put new men at such work as would compel them to use the runway and crossing in question, and that he, the witness, was in the habit of so putting new men at work at that place. There is evidence to the effect that sometimes a locomotive pulled a car or cars and at other times pushed a car or cars through the doorway in question across the runway. When the plaintiff was injured the locomotive was pushing a car laden with moulds. No person was on the car, nor did it carry a light. Wooley testified that the moulds carried out in the cars were "hot; a very dull red and dark." Such cars pushed by the locomotive, in so far as they intervened between the vision of a person standing at the point where the plaintiff was injured and a locomotive pushing such car, of course, rendered the locomotive invisible to him. It appears from the evidence that the mould yard was used principally for the purpose of cooling the hot moulds which were taken from the mill; water being turned on the moulds for that purpose. The cooling of the moulds in this manner resulted in large quantities of steam which either hung over the yard or was carried in one direction or another by the wind. Tomaney testified to the effect that the steam from the moulds obscured the electric light hung in the mould yard. There was some conflict of testimony as to the extent to which the light was thus obscured. It appears from the evidence that the customary means of warning persons in the mould yard of the approach of locomotives or cars from the mill was blowing the whistle of the locomotives while within the mill and some twenty five feet from the doorway. While two such locomotives called dinkey engines were employed in and about the mill and mould yard of the defendant at the time the plaintiff met with his injury, usually three such locomotives were used. The operations carried on in the mill were of such nature as to produce a confusion and mingling of loud noises of various kinds incident to a mill of that character. Tomaney testified that there were noises in the mill from stationary engines and bessemer cupolas. Julien testified to the effect that the three locomotives whistled "every place wherever they go"; that they whistled both when they passed out of the mill and when they passed into the mill; that they whistled as they passed back and forth within the mill, when not intending to pass out; and that the locomotives "always whistle, they are always going, never stop." Under the circumstances disclosed and especially in view of the proximity of the runway crossing to the doorway, it is evident that the custom of signaling by whistle was not calculated adequately to protect an inexperienced operative, such as the plaintiff was, having occasion to use the runway crossing; and this is all the more apparent in view of the fact that at most only two or three seconds could elapse between the time when a person on the runway crossing within one foot of the nearer rail could, under the most favorable circumstances, first see a car or locomotive coming round the sharp curve on its way out of the mill, and its reaching the spot

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where he stood. On the runway crossing lurked sudden death or mutilation for those who used it without exercising the utmost vigilance. An operative, wheeling a heavily laden barrow six feet long and stumbling or making a misstep while a locomotive or car was moving on its way out of the mill, would incur grave peril of loss of life or limb. The runway crossing was, by reason of the mode in which the defendant carried on its operations, a peculiarly hazardous place. There was some evidence relating to the nature of the caution generally given to new men about the danger resulting from the movements of locomotives. This evidence, however, is vague, indefinite and unsatisfactory. Barnes, the foreman of the bessemer department, testified: "As a rule I generally cautioned the men about the tracks to be crossed and the locomotive coming out on the tracks." Wooley testified: "Q. Isn't it your habit to warn those men in regard to locomotives when they are employed? A. The foremen generally warn them. Q. As a matter of fact, they are all supposed to be warned, are they not? A. No; I can't say that. Q. It is the custom to warn them all, is it not? A. Not particularly about the locomotives, no, no more than anything else about the works. Q. You warned them in regard to all the dangers of their employment? A. Of their employment. * * * Q. You also said in answer to Mr. Demming that it was your custom generally to warn men. What kind of warning do you give them? A. If the foreman hires a man, he turns them over to the gang in which he is to work, and the man understands it, without being told every time, to tell him what the work is, and he can certainly see without being told, although he is very often told, and I think as a rule told, where the dangers are, if there are any particular ones, and to avoid them." In point of fact the evidence does not disclose that the plaintiff was cautioned at or after the time of his employment by the defendant. On the contrary, the testimony shows that he was not. Such a caution or warning as is above indicated, had it been given, was manifestly inadequate and of little importance in so far as the runway crossing is concerned. Certainly every person of full age and sound mind, who has seen locomotives or cars moving along tracks, is supposed to know that if he steps on the railway directly in front of an approaching locomotive or car and remains there until struck, he will be liable to loss of life or limb. And so every reasonable man must regard a railway, which is operated, as in itself a warning of danger, putting him on his guard. But the giving of information only as to these points is of small avail. Any sane adult possesses such knowledge without instruction from his employer. It appears from the evidence that the only rule established by the defendant for the protection of operatives using the runway crossing against locomotives or cars emerging from the doorway, was that a whistle should be given by the locomotive as a signal of its approach. But this signal, in view of the physical environments of the runway crossing and the noisy din and confusion of whistles within the mill, was, in my judgment, clearly an inadequate caution or warning to new and inexperienced operatives using that crossing and unable properly to locate and distinguish the sounds within the

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mill. The evidence does not show the existence of any rule requiring operatives about to use the runway crossing to stop before going upon it. And, had any such rule existed, it would be proper for the jury to pass on its sufficiency with respect to inexperienced employés. For a man, burdened with a heavily laden wheelbarrow, undertaking, even after stopping to go across the tracks, was liable to be struck and killed within one second from the time a car or locomotive should project beyond the doorway, and within two or three seconds from the time when, under the most favorable circumstances, he could have seen from the crossing the approach of a locomotive or car. It could hardly be expected, and evidently was not intended by the defendant, that operatives before crossing the tracks should leave their wheelbarrows and go through the doorway to ascertain whether a car or locomotive was approaching. There was no rule that this should be done; the defendant relying only on the whistle as a signal. Owing to the large number of crossings made each night, it was probably impracticable that it should be done. And if it had been done, the operatives would, on returning to their wheelbarrows, have been subject practically to the same peril as if it had not been done. New and inexperienced operatives were entitled to a reasonably proper and sufficient warning of the peril, and such a warning does not mean a general warning to look out for cars and locomotives given at the inception of the employment, but, in a case like this, a reasonable and sufficient warning given to the operatives at the time a locomotive or car was about to cross the runway. The warning should have been timely, and the approach of a locomotive or car marked the right time. An obviously proper rule for the giving of such warning would have required an operative, when a locomotive or car was about to emerge from the mill, to be stationed at the doorway or to precede the locomotive or car. In such case, it would not have been necessary that a locomotive or car, about to pass from the mill across the runway, should stop. While the defendant was not an insurer of the safety of the plaintiff at the time he received his injuries, and while the plaintiff, when he entered the service of the defendant, assumed the ordinary and usual risks of his employment, including the risk of injury from the negligence of his fellow servants, in the absence of negligence on the part of the defendant in their selection or retention, he did not assume any risk resulting from the defendant's negligence, nor had the defendant any right to expose him to unusual and unnecessary peril against which the defendant by the exercise of reasonable care could guard him. The plaintiff had the right to assume that he would not be exposed to such peril. The evidence does not show any necessity for the maintenance of the runway and runway crossing in such close proximity to the mill. Had the plaintiff's service in the employ of the defendant been of long continuance, and had he become thoroughly familiar with the noises in the mill and the mode in which the defendant operated its cars and locomotives when passing through the doorway, a case materially different from the one in hand might be presented. But the plaintiff, as a new and inexperienced operative, had a right to rely upon greater care, con-

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sideration and protection, than he received from the defendant. It was his right that the defendant should use reasonable care and precaution for his protection at the runway crossing.

In Improvement Co. v. Stead, 95 U. S. 161, Mr. Justice Bradley, delivering the unanimous opinion of the court, in speaking of a railway grade crossing on a common road, said:

"The train has the preference and right of way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. But what is reasonable and timely warning may depend on many circumstances. It cannot be such, if the speed of the train be so great as to render it unavailing. The explosion of a cannon may be said to be a warning of the coming shot; but the velocity of the latter generally outstrips the warning. The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell; and this caution is especially applicable when their sound is obstructed by winds and other noises, and when intervening objects prevent those who are approaching the railroad from seeing a coming train. In such cases, if an unslackened speed is desirable, watchmen should be stationed at the crossing."

So, here, the defendant, in view of the surroundings of the runway crossing, should have adopted and promulgated a rule for the protection of new and inexperienced operatives requiring someone to stand at the doorway or precede locomotives or cars emerging from the mill. Had the defendant adopted and promulgated such a rule and used reasonable circumspection to secure its enforcement at all times, the negligent omission of the operative or operatives detailed or designated for that purpose in any given instance to carry out the rule, might be considered negligence with respect to an executive detail of the operation of the defendant's plant, and, as such, not to involve the defendant in any liability for an injury received through such negligent omission. But it is unnecessary to further pursue this particular branch. In my judgment, the defendant was culpably negligent, with respect to the plaintiff, in not establishing such a rule. The above points relating to the negligence of the defendant, if not, indeed, sufficient to establish such negligence as a matter of law, should certainly have been freely and fully left for consideration by the jury. Were they so left? If not, in view of their important bearing upon the case, there was reversible error. In Starr v. U. S., 153 U. S. 614, 14 Sup. Ct. 923, Chief Justice Fuller, delivering the opinion of the court, in speaking of the proper functions of a judge in charging juries, said:

"But he should take care to separate the law from the facts and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province. McLanahan v. Insurance Co., 1 Pet. 170, 182. As the jurors are the triers of facts, expressions of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgments. They should be made distinctly to understand that the instruction is not given as to a point of law by which they are to be governed, but as a mere opinion as to the facts to which they should give no more weight than it was entitled to."

The seventh assignment of error is as follows:

"(7) The learned judge erred in instructing the jury as follows: 'I feel it to be my duty to say to you that I do not think the evidence justifies a

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conclusion that the defendants failed in their duty in this particular. I do not take the question from you; I submit it to you; the responsibility will be upon you of deciding it justly. But you ought not to reach a conclusion on the subject without the exercise of great care, and the best judgment you possess. You cannot undertake to say how an establishment like this shall be constructed, how the railroad shall be located, what will answer its purposes, and what will not. You have not the information necessary to enable you to form a reliable judgment. The real question here in this respect is, whether or not proper warning was given to this man at that crossing, or whether he was misled respecting it, for want of proper information. These are the questions, and the only questions that the court sees as respects this branch of the case, and I repeat what I have said, that in the judgment of the court, the evidence on one side and the other, properly considered, does not justify a conclusion that the defendant omitted, or failed in, any part of its duty in this matter. I repeat, however, so that you will not misunderstand me, that the question is one of fact, which is submitted to you. If you find that the defendants were not negligent, your verdict will be in their favor.' "

The learned judge below, in this portion of the charge was dealing principally with the sufficiency of a locomotive whistle as a warning of danger and with the knowledge of the plaintiff of the situation generally. On these points, while expressing his opinion adversely to the plaintiff, the learned judge nevertheless left them for the decision of the jury. But language was used which virtually took away from the jury the right to determine whether the defendant was not culpably negligent toward the plaintiff, in failing to adopt a rule requiring warning to be given of the approach of a locomotive or car by an operative stationed at the doorway, or preceding the locomotive or car. The learned judge said:

"You cannot undertake to say how an establishment like this shall be constructed, how the railroad shall be located, what will answer its purposes, and what will not. You have not the information necessary to enable you to form a reliable judgment."

The jury was thus told in effect that they had not the information or the power to decide whether the defendant was not at fault for omitting to adopt such a rule as is above indicated. The jury, however, in my judgment, had that right. Neither the rule of damnum absque injuria nor any other principle of the law deprived the jury of that right. I am, therefore, of the opinion that fatal error was committed which requires the reversal of the judgment of the court below and the granting of a new trial.

With respect to alleged error in the charge touching contributory negligence I fully concur with the presiding judge in his views on that subject.

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(88 Fed. 48.)

BADGER SILVER MIN. CO. v. DRAKE.

(Circuit Court of Appeals, Fifth Circuit. April 12, 1898.)

No. 633.

1. VENDOR AND PURCHASER—CONSTRUCTION OF LAND CONTRACT.
A contract under seal, by which one party agrees to sell and another agrees to buy certain lands and other property, which provides for delivery of the property and payment therefor, and the deposit of deeds in escrow for delivery upon completion of the payments, is a contract of sale, and not a contract for sale.

2. PRINCIPAL AND AGENT—UNDISCLOSED PRINCIPAL.
Plaintiff's assignor, by contract under seal, sold land to an agent, who contracted in his own name without disclosing his principal. *Held* that, on default of payments, the plaintiff had no right of action against the principal afterwards discovered.

In Error to the Circuit Court of the United States for the Southern District of Florida.

This action was brought by the plaintiff in error against A. M. Drake and Levy Mayer in the circuit court of Suwannee county, Fla., and removed to the federal court, no service being had upon Mayer.

The action was brought upon the following contract:

This agreement, made at Milwaukee, in the state of Wisconsin, this 13th day of January, 1891, by and between the Badger Silver Mining Company, of Gillies, Ontario, a corporation, organized under the laws of Wisconsin, party of the first part, and Herbert N. Nichols, of Denver, Col., party of the second part, witnesseth:

First. Said first party hereby agrees to sell, transfer, assign, convey, and deliver unto said second party all the property, of every kind, character, and description, of said first party, real, personal, and mixed, wheresoever situate, whether enumerated herein or not. Said property embraces, among other things, the following: That part of mining location known as 200 T, commencing at the northeast corner of said 200 T; thence, running south, along the east line of said 200 T, 12 chains 98 links, more or less, to a point; thence west 80 chains 8 links, more or less, to the west boundary of said 200 T; thence north twelve chains 98 links, more or less, to the northwest corner of said 200 T; thence east, along the north line of said 200 T, 80 chains 13 links, more or less, to the point of beginning,—containing one hundred and four acres, more or less, comprising all the land in said 200 T deeded to the said first party by John M. Stowell. Also the mining location known as 201 T and 96 T, the said 201 T and 96 T, together with the said land in said 200 T, embracing 360 acres, more or less, all of said location being in the township of Gillies, district of Thunder Bay, province of Ontario, Canada. Also all mills, buildings, improvements, fixtures, machinery, tools, implements, and supplies in, upon, or about said mining locations, or used in connection with the working and operation of the same. Also all ores of every description, wherever the same may be. Also all books, maps, plans, papers, and documents, now in use or heretofore used in connection with the working of said mining location or the business connected therewith or otherwise. Said first party hereby covenants and agrees that it has a good, clear, free, absolute, and uninterrupted right to sell, transfer, assign, convey, and deliver all of the foregoing property, and every part thereof; that it has an absolute and indefeasible title in fee simple to all of said real estate, and that it is the absolute owner of all said personal property; that all of said property, real, personal, and mixed, and wheresoever situate, is free and clear from all mortgages, charges, incumbrances, liens, claims, taxes, and assessments whatsoever, except as hereinafter stated; and that it will forever

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warrant and defend the title to said property, and every part thereof, against any and all person or persons, corporation and corporations, whatsoever. Absolute and uninterrupted possession of all the said property in manner and form as aforesaid shall be delivered to said second party on or before February 10th, 1891, and none of said property of any kind shall be removed or disposed of in any way by said first party, its agents or employés, on and after the date hereof. It is the intent of this agreement that though absolute possession may not be delivered until on or before February 10th, 1891, the same shall take effect on, and relate back to, the date hereof. It is understood that the said first party, for purposes of convenience, has held and holds the title to said mining location 96 T, otherwise known as the "Porcupine Mine," in the name of John M. Stowell, as trustee, the president of said first party, and that the mining location last aforesaid is subject to an incumbrance of about $13,000.00. It is covenanted and agreed by said first party that, contemporaneously with the making of the payment of the sum of $24,000.00 hereinafter referred to, the said amount or so much thereof as is necessary shall be immediately applied towards the complete release and payment of said incumbrance, and that contemporaneously therewith the said Stowell shall execute and deliver to the escrow hereinafter mentioned a good and sufficient warranty deed running to the said second party or his assigns, and containing covenants of warranty on the part of said Stowell against any and all acts and omissions on his part, and containing also full covenants of warranty on the part of the said first party. The deed last aforesaid shall at once be joined in by the wife of the said Stowell, releasing all her dower and homestead rights, if any, therein. The said deed, immediately upon its execution, shall be delivered in escrow to the American Trust & Savings Bank, of Chicago, Ill., by said bank to be held until all of the payments hereinafter referred to have been made in manner as hereinafter set forth, on the making of which the said deed shall be delivered by said bank to said second party or his assigns. Contemporaneously with the execution and delivery of this contract, the said first party shall execute and deliver to said escrow full and complete and absolute instruments of transfer and conveyance, containing full covenants of warranty, and conveying to said second party or his assigns all of the property hereinbefore specified. Said instruments of transfer and conveyance shall be held by said escrow until all the payments hereinafter referred to have been made in manner as hereinafter set forth, and, immediately upon the making of the same, shall be delivered to said second party or his assigns.

Second. Said second party hereby agrees to and does purchase all of the foregoing property, and agrees to and shall pay therefor the sum of two hundred and fifty thousand dollars ($250,000) in manner following: $1,000 in cash upon the date of the execution of this agreement, the receipt of which by said first party is hereby acknowledged; $24,000.00 in cash on or before February 10th, 1891; $25,000 in cash on or before May 1st, 1891, with interest thereon from the date hereof at the rate of 6 per cent. per annum; $25,000 shall be paid into said bank as escrow on or before Sept. 1st, 1891, with interest thereon from the date hereof at the rate of 6 per cent. per annum; $50,000 shall be paid into said bank as escrow on or before December 1st, 1891, with interest thereon from the date hereof at the rate of 6 per cent. per annum; $50,000 shall be paid into said bank as escrow on or before March 1st, 1892, with interest thereon from the date hereof at the rate of 6 per cent. per annum; $75,000 shall be paid into said bank as escrow on or before July 1st, 1892, with interest thereon from the date hereof at the rate of 6 per cent. per annum. If the titles to the said property or any part thereof shall upon examination by the solicitors of said party of the second part be found to be other than as hereinbefore covenanted, then, upon notice of said fact to said escrow, the said moneys so to be deposited with the said escrow as aforesaid shall not be paid over to said first party until the defects in said title, if any, shall have been satisfactorily cured, or the value of said defects adjusted and paid or abated to said second party or his assigns; and thereafter, or in the event of the titles to said property being as herein covenanted, the said payments shall, after they have been made to said bank as escrow as aforesaid, and provided said first party shall not be in default in any way in the premises,

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be paid to the said first party by said bank, and contemporaneously therewith the said deeds so as aforesaid to be held in escrow by said bank shall be delivered to said second party or his assigns. If the said titles shall be found satisfactory by said solicitors, as herein provided, before the time for the making of said last payment to said escrow, then and in that event the said escrow shall turn over such payments theretofore made or thereafter to be made to it under this contract to said first party, provided said first party shall not be then in any way in default in the premises. It is further covenanted and agreed that if it becomes necessary to take any proceedings to cure any defects, if any, in any of the titles to the property aforesaid, that such proceedings shall be taken at the sole expense of said first party, and said second party, his heirs, legal representatives, and assigns, shall, if necessary, join in or allow such proceedings, and do whatever is necessary to effect the same, provided said second party is satisfactorily secured and indemnified in the premises.

Third. It is covenanted and agreed that, until the full payment is made of all said deferred payments, sixty per cent. of the net receipts for ores hereafter mined and sold before the making of said final payments as aforesaid shall be applied towards the said deferred payments. The said ores, prior to the making of said final payment as aforesaid, shall be shipped to Balbach & Sons, Newark, New Jersey, or any other responsible and reliable smelter to be selected by said first party, provided said Balbach & Sons or said other smelter shall do the smeltering as cheap as any other equally responsible or reliable smelter. Said first party is hereby given the right, at its own sole cost and expense, to place a man at said mining locations until all of said deferred payments have been made as hereinbefore specified; and such man shall have the right to ascertain the amount of all said net receipts as aforesaid, but he shall have no right of any kind in any way to interfere with the working of said mining locations, or the conduct, control, or management of the business therewith connected.

Fourth. If said second party shall make default in any of the payments specified in paragraph second of this contract, and shall continue in default for thirty days, then and in that event said first party, if said first party shall not then be in default in the premises, shall have the right to forfeit all payments heretofore made in the premises, and to become reinvested with the title to all of said property, with the same effect as though this instrument had not been made; but the second party shall not be entitled to withhold payment of the first $50,000 of said purchase price on account of any defect of title to said mining locations known as 200 T and 201 T.

Fifth. Said first party further covenants and agrees that it will properly execute and deliver, and cause to be properly executed and delivered, promptly, upon demand, any and all instruments of transfer and conveyance which may from time to time be required by said second party in the premises, for the purpose of fully and completely carrying out both the spirit and letter of this instrument; said instrument of transfer and conveyance to contain full and complete covenants of warranty.

It is the intention of this agreement that the payments made to the bank in escrow shall be withheld by the bank until the title to said premises is in such condition that the deeds herein specified will confer upon the party of the second part such title as is herein covenanted, and that after said title is perfected as aforesaid, and so found by the solicitors of the party of the second part, that then the payments made to the bank shall be paid over forthwith to the party of the first part, but that the deed shall remain in escrow until the completion of all the payments. This instrument in all its parts shall be binding upon the said first party and all of its stockholders, its successors and assigns, and shall run to and in favor of the said second party, his heirs, legal representatives, and assigns, forever.

In witness whereof, the said first party has caused these presents to be signed by its president, and attested by its secretary under its corporate seal, and the said second party has attached hereto his hand and seal, all done the day, date, and place first above written.

The Badger Silver Mining Company of Gillies, Ontario,
[Corporate Seal.] By John M. Stowell, President.

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Attest: Walter Read, Secretary.
Herbert N. Nichols. [Seal.]
Signed, sealed, and delivered in presence of:
Elias H. Bottom.

State of Wisconsin, Milwaukee County—ss.: Be it remembered that on this 7th day of Feby., 1891, personally appeared before me John M. Stowell, president, and Walter Read, secretary, of the Badger Silver Mining Company of Gillies, Ontario, to me personally well known to be such officers, and to me well known to be the persons described in and who executed the foregoing contract, and severally and duly acknowledged the execution of the foregoing contract as president and secretary, respectively, as their free act and deed of said corporation; and the said John M. Stowell and Walter Read severally affirmed before me that they executed the foregoing contract for and on behalf of the said corporation by virtue of and pursuant to the unanimous vote of the directors of said corporation lawfully taken.

Witness my hand and official seal. Chas. L. Goss,
[Notarial Seal.] Notary Public Milwaukee County, Wisconsin.

Milwaukee, Wisconsin, Jan. 30, '91.

For good and valuable considerations to us and each of us, who are stockholders of the Badger Silver Mining Co., the party of the first part in the foregoing contract, this day in hand paid, the receipt of which is hereby acknowledged, we, the undersigned, do hereby fully consent to ratify, approve, and confirm the action of the Badger Silver Mining Co. as evidenced by the foregoing instrument and all of its parts, and hereby covenant to and with Herbert N. Nichols, the party of the second part to said contract, his heirs, legal representatives, and assigns, forever, that we and each of us hereby do and will and shall guaranty the full, complete, and prompt performance by the said Badger Silver Mining Co. of all and every part of the said contract by the said Badger Silver Mining Co. to be performed. The individual liability of each of us under this contract is however expressly limited to such proportion of the purchase price specified in the foregoing instrument as our respective holdings of the stock of said Badger Silver Mining Co. bear to the total capital stock thereof.

Name of Stockholders.	No. of Shares.
Jno. M. Stowell	6,362½
Geo. W. Robinson	11,923
C. A. Reed	7,591
Walter Read	8,148½
Chas. E. Sammons	5,312½
Ch. Preusser	1,250

The declaration alleges that Nichols was, at the time of the negotiation and making of the contract, a duly-authorized agent of the defendants, A. M. Drake and Levy Mayer, and of C. E. Dickerman and A. H. Wilder, for the purpose of making the contract, and that said Nichols entered into and executed the contract as the agent for and on behalf of the said Drake, Mayer, Dickerman, and Wilder; that Dickerman and Wilder have died since the execution and delivery of the contract, and were never residents of the state of Florida, and that the plaintiff company has not been able to ascertain who had been appointed as administrator of the estate of either of said decedents; that, in pursuance of the said contract, defendants and their associates paid to the said first party $25,000, the first two payments under the contract, on or about the 10th of February, 1891; and that on or about the last-named date the defendants and the said Dickerman and Wilder received, and the said first party delivered, possession of all the property mentioned in said contract as purchased by the said Nichols, and have ever since retained

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the same. The declaration also alleges the delivery by the first party to the bank named in the contract of sufficient deeds of the lands described in the contract, and the making of a good title to Nichols to said lands, and that all things precedent to be done by the plaintiff had been done, but that the defendants had not carried out the contract or paid any further portion of the purchase money beyond $25,000. The transfer from the first party to the contract to the plaintiff herein of the contract and all its rights thereunder is alleged, and the declaration seeks to recover from Drake and Mayer the purchase price of the property sold and delivered. In the second count it alleges the damages sustained by the plaintiff to have been the loss of profits arising from the defendants' failure to carry out the contract. The third count alleges that the defendants and their associates have been in possession of the property ever since the time of delivery, and have derived therefrom large sums of money, which the plaintiff seeks to recover.

The declaration was demurred to, on the ground that the declaration and contract showed that Nichols was not the agent of the defendant Drake, and that no testimony was admissible to establish such agency. The demurrer was sustained by the order following:

"This cause having come on to be heard, by brief, on defendant's demurrer to plaintiff's declaration, and having been duly considered, the court considers that the decisions cited in 135 U. S. 313, 10 Sup. Ct. 831 [Willard v. Wood], 64 N. Y. 358 [Briggs v. Partridge], and 2 N. E. 785 [Haley v. Belting Co. (Mass.)], apply to the facts in this case; that the contract sued upon was not a contract for sale, but a contract of sale, so far as questions of covenanting by both parties are concerned; that third parties not mentioned in the contract cannot be sued upon covenants to which they are not directly parties in the contract. Nichols covenants for himself, and discloses no one else. It is therefore ordered that the demurrer herein be sustained."

The plaintiff then filed an amended declaration based, in one count, on the theory of an implied contract on the part of the defendants to pay for the value of the property, as evidenced by the purchase price, specified in the written contract, on the alleged grounds that the defendants and their associates received and retained the property. In another count the theory is that the defendants are liable to pay for the value of the silver ore taken from the mines while in the possession of the defendants and their associates, which ore is alleged to have been converted by the defendants to their use. This amended declaration was also demurred to, and demurrer sustained.

W. A. Blount and A. C. Blount, Jr., for plaintiff in error.

H. Bisbee, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PER CURIAM. For the reasons given by the trial judge, and considering Willard v. Wood, 135 U. S. 309, 313, 10 Sup. Ct. 831, Cragin v. Lovell, 109 U. S. 194, 3 Sup. Ct. 132, Briggs v. Partridge, 64 N. Y. 358, and Haley v. Belting Co., 140 Mass. 73, 2 N. E. 785, the judgment of the circuit court is affirmed.

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(88 Fed. 53.)

STAPYLTON v. CIE DES PHOSPHATES DE FRANCE.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1898.)

No. 623.

BANKS AND BANKING—RECEIVERS.

Defendant deposited in bank a draft drawn on its New York correspondent, having theretofore slightly overdrawn its account. The draft was passed to defendant's credit, and checked against. On suspension of the bank, defendant stopped payment of the draft by telegram, whereupon plaintiff sued as receiver to recover on the draft. *Held*, that he was entitled to recover only the amount due the bank after charging back the draft.

In Error to the Circuit Court of the United States for the Southern District of Florida.

This was a suit brought by G. C. Stapylton, as receiver of the First National Bank of Ocala, against the Cie des Phosphates de France, a corporation under the laws of France, upon a draft for $3,000, directed to Lazard Freres. The draft was duly presented for acceptance, and dishonored, of which the defendant had due notice. The defendant pleaded that the bank did not own the draft, and pleaded a set-off of $2,665.13, a balance on deposit account of the First National Bank of Ocala at the time of the suspension of the bank, and also a claim of set-off of $500 by reason of a certain draft drawn by the Ocala Bank in favor of the Live Oak Bank upon the National Bank of Jacksonville,—a draft which was the property of the defendant, and represented money which defendant had placed with the Ocala Bank to purchase said draft. The cause was submitted to the judge without a jury, and the plaintiff proved the draft was made and executed by the defendant, and placed to the credit of defendant in the Ocala Bank as cash, and drawn upon as cash; that the draft was sent to New York for collection; that the draft was returned from New York, having been presented for payment, and payment refused; that payment was refused by Lazard Freres because payment was stopped by a telegram by the defendant through its manager, P. Levy; that by the course of dealing between the defendant and the bank, the bank had been in the habit of receiving such drafts as cash, and crediting the same to the defendant as cash, and that this draft was entered both on the bank's books and on the book of the defendant, or by a receipt given it, as so much cash deposited. The defendant sought to show that of this $3,000 there was a credit balance of $2,665.18 on the books of the bank at the time of the failure. The plaintiff objected to the introduction of this evidence on the ground that defendant was not entitled to set off the said alleged credit balance, and allowing the said set-off being equivalent to permitting the defendant to make itself a preferred creditor by its own action in refusing to pay the $3,000 draft; that such proceeding was contrary to the acts of congress controlling national banks.

The statement and findings of the court below are as follows:

"That the defendant, by its general manager, P. Levy, deposited in the First National Bank of Ocala, of which the plaintiff herein is the regularly appointed and qualified receiver, on the 16th day of April, 1895, its check on Lazard Freres, New York, for $3,000, payable to the order of said bank. That the same was credited to the defendant's general deposit account on the books of the said bank. That defendant had been accustomed to so deposit checks to be drawn against after the officers of the defendant company had exhibited to the officers of the bank advices by cable from their Paris office authorizing such checks. There was no contract or agreement between the parties with regard to the treatment of such checks, but they were usually placed to the general account of the defendant, and drawn

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against as funds were required. There had been certain checks drawn by the general manager of the defendant company upon the bank, which were outstanding at the time of this deposit, to the extent of $777.30, which was paid, and charged to the account of the company. That the said check of $3,000 was not paid upon presentation to the drawee in New York, and the protest fees amounted to $1.31, which were paid by the plaintiff. That allowing the defendant the $3,000 credit given it for the unpaid check, there was to the credit of the defendant company by said bank, at the time of insolvency, $2,665.18; but charging back the $3,000 credited for said check there was an overdraft of $334.82 due said bank; and the court fails to find sufficient evidence of the indebtedness of the plaintiff to the defendant of the $500 pleaded as set-off by said defendant to find such set-off. And the court finds as a mixed matter of law and fact that the defendant company is indebted to the plaintiff in the amount of $334.82, and interest to the amount of $50.70, making a total amount of $385.52, for which judgment should follow, together with the costs to be herein taxed and allowed."

J. C. Cooper, for plaintiff in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PER CURIAM. As a jury was waived in the court below, the findings of fact by the judge are controlling in this court; and, considering those findings, applying the principles declared in Railway Co. v. Johnston, 133 U. S. 566, 10 Sup. Ct. 390, and Scott v. Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, the judgment of the circuit court does substantial justice between the parties, and is therefore affirmed.

(88 Fed. 54.)

UNITED STATES v. STRATTON.

(Circuit Court of Appeals, Fifth Circuit. May 24, 1898.)

No. 685.

1. SUITS AGAINST UNITED STATES—SUFFICIENCY OF FINDINGS.

Under the act of March 3, 1887, providing for the bringing of suits against the United States, which requires the court to file an opinion setting forth the specific findings of fact, etc., such findings must exhibit exactly the services for which compensation is asked; and, in a suit by a United States commissioner to recover for fees, a finding that he has rendered services as follows: "Charges for per diems for taking bail under capias, etc., $160.00,"—is insufficient, because it cannot be inferred therefrom what the charges are for.

2. SAME—PLEADING.

A petition filed under the act of March 3, 1887, must, as required by section 5, contain a succinct statement of the facts on which the claim is based. And, in a petition by a United States commissioner to recover for fees, general statements of items—such as "Per diems for taking bail," "Charges for per diems in certain cases," "Charges of all fees in case v. Holloway," etc.—are insufficient.

In Error to the District Court of the United States for the Middle District of Alabama.

This suit was commenced by the filing of a petition in the district court, as follows:

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"Your petitioner, Asa E. Stratton, who is a resident citizen of Pike county, in the state of Alabama, and district aforesaid, respectfully shows to your honor:

"First. That petitioner was duly appointed and legally qualified as a commissioner of the circuit court of the United States for the Middle district of Alabama, on the 9th day of June, A. D. 1894, and that, continuously since the day of his appointment and qualification as such commissioner, has rendered and performed services to the government of the United States, hereinafter referred to, and specifically set out in a bill of particulars herewith filed, marked 'Exhibit A,' and made a part of this petition. Petitioner further alleges that said services were rendered and performed at the instance and request of the United States, and that such service consisted in taking complaints and the issuance of warrants, and the examination under complaint and warrant of such persons as were brought before him as such commissioner by the marshal of said Middle district of Alabama charged with the violation of the internal revenue laws and other criminal statutes of the United States, and in the holding of persons to bail who had been arrested under capias, or other legal process of the courts of the United States.

"Second. Petitioner avers that he is entitled to have and receive from and to be paid by the United States the aggregate sum of six hundred and five dollars and seventy cents ($605.70). The said amount is made up of the following items, shown by the summary to the account hereinbefore referred to, as Exhibit A, and made a part of this petition, to wit:

Per diems for taking bail only	$160 00
Charge for subpœnas, entering, returning, and filing	7 50
Charge for more than one warrant when there was more than one defendant in a case	38 00
Charges for filing mittimus sent to clerk	10
Charge for writ of attachment for defaulting witness	3 75
Charge for per diem on a warrant issued in Florida	5 00
Charge for duplicate order to marshal to pay witness	1 20
Charge for certified transcript of proceedings	35 10
Charge for excess of one folio in recognizances	172 90
Charge for complaint in addition to testimony of informing witness	55 25
Charge for testimony of informing witnesses in addition to complaint	17 60
Entering return and filing warrant in cases tried by some other commissioner	10 00
Charges for filing complaint issued by some other commissioner	1 80
Charges for per diems in certain cases	60 00
Charges for per diems in case United States v. Eddins	5 00
Charges of all fees in case v. Holloway	13 60
Charges for excess of one folio on each day in case for docket entry	8 55
Charges for per diems in case v. Wadsworth	5 00
Charges for justifying sureties on bonds	50
Charges for docket entries	95
Total	$605 70

"Third. Petitioner avers that he made out, rendered in due form, and at the proper time, accounts for the several quarters on the respective fiscal years since his appointment and qualification, as aforesaid; that said accounts embraced each and all of the items herein sued for; and that the same were duly allowed by your honor's court, and thereafter forwarded in due course to the proper auditing and accounting officers of the government of the United States, as will more fully appear from the record of said court.

"Fourth. Petitioner further avers that each [and] all of the several items and charges in said Exhibit A and summary thereto, and which are here sued on, were the items and charges in petitioner's said accounts for services rendered as such commissioner, and are the items and charges which the said auditing and accounting officers, in the adjustment of petitioner's said accounts, erroneously and unlawfully suspended and disallowed.

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"Fifth. Petitioner further avers that the said account, amounting in the aggregate to six hundred and five dollars and seventy cents ($605.70), as shown in said Exhibit A, and each and all of the items and charges therein, are due and owing to your petitioner; that no part of the same has been allowed or paid to him by the defendant, the United States of America, nor has any part thereof been passed upon or rejected by any court authorized to pass upon the same; and that petitioner now has the legal right to claim, sue for, and receive payment therefor,"—concluding with prayer for judgment.

The Exhibit A referred to in the petition as a bill of particulars appears to be the copy of the commissioner's account for several quarters prior to the institution of the suit, upon which memoranda have been made by accounting officers of the government and by petitioner. The following is a sample:

2.	2.	Account from July the 1st to September 30, 1894. Judiciary No. 506.	
3.	2.	Charge for taking bail only (per diem) after completion of case, disallowed. This is not a hearing or deciding on criminal charge, within the meaning of the statute. This is simply a clerical, and not a judicial, act.....	$20 00
4.	3.	Charge for more than one warrant where there are more than one defendant in a case, disallowed. All defendants in a case should be included in one warrant.....	17 50
5.	4.	Charge for more than one copy of complaint as unnecessary, as in item 3 (attached to warrant).....	5 25
6.	5.	Charge for more than one subpœna at any time, disallowed. All witnesses should be included in one subpœna, you being allowed for copy for service..... (There was no charge except for copy for each witness, and all witnesses were included in the original.)	6 25
7.	7.	Charge for filing mittimus sent up to the clerk, disallowed, who files it.....	10
8.	8.	Case v. Henry Ansley and R. L. McAlliley. Charge for writ of attachment for defaulting witness suspended to know if this was issued under rule of court, or state practice. If so, send certified copy of the rule.....	1 25
9.	9.	Case v. Bullell Phillips et als., the same as item 8.....	2 50
10.	11.	Charge for duplicated copies of subpœnas and order for marshal in duplicate, disallowed. To pay witness. The witnesses should not have been discharged until the case was completed ..... (There was no duplicate orders to the marshal to pay witnesses. Part of the witnesses came in on one day, were examined, and discharged. The others came on another, were examined, paid, and discharged.)	1 20

Service was duly made upon the attorney general, but the United States made no appearance to the suit, and thereupon, after proper delays, the following entry was made by the court:

"Finding of Fact and Law.

"Thursday, June 24, 1897.

"In the District Court of the United States for the Middle District of Alabama.

"Asa E. Stratton vs. The United States.

"The above-entitled cause, coming on regularly to be heard at the present term of the court, on the 16th day of June, A. D. 1897, was submitted for decision on pleadings and evidence, and the court makes and files the following findings of facts: First. That petitioner is now, and has been since the ninth day of June, 1894, a commissioner of the circuit court of the United States for the Middle district of Alabama. That said petitioner, as such commissioner, has, at the instance and request of the United States, performed certain services, which are as follows, to wit:

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Charges for per diems for taking bail under capias, &c.	$160 00
Charges for subpœnas, entering, returning, and filing	7 50
Charges for more than one warrant when there was more than one defendant in a case	38 00
Charge for filing mittimus sent to clerk	10
Charge for writ of attachment for defaulting witnesses	3 75
Charge for per diem on warrant issued in case of defendant from Florida, and for removal proceedings	5 00
Charge for duplicate order to marshal to pay witnesses	1 20
Charge for certified transcript of proceedings	35 10
Charge for excess of one folio in recognizances. These recognizances contained about seven folios, but the petitioner only charged for four folios, making his claim for this item	172 90
Charges for complaint in addition to testimony of informing witnesses	55 25
Charges for testimony of informing witnesses in addition to complaint	10 00
Charges for filing complaint issued by some other commissioner	1 80
Charges for per diems to trying cases	45 00
Charges for fees in case U. S. v. Holloway	13 00
Charges for excess of one folio on each day in case for docket entry	8 55
Charges for per diem in case U. S. v. Wadsworth	5 00
Charges for justifying sureties on bonds	50
Total	$580 85

"All of these items have been presented in said commissioner's quarterly account, heretofore rendered and disallowed by the accounting officers of the treasury.

"The court finds as a fact that said services were actually rendered by said petitioner, and therefore the court files the following as its findings of law: First. The court declares and holds, that under the provisions and statutes of the United States regulating the fees to be paid to commissioners of the circuit court of the United States, the charges hereinbefore set forth are proper charges against the United States.

"John Bruce, Judge.

"Judgment: It is therefore ordered and adjudged by the court that the petitioner, Asa E. Stratton, do have and recover of and from the defendants, the United States of America, the sum of five hundred and eighty dollars ($580.85) and eighty-five cents, together with the costs in this behalf expended.

"Filed June 24, 1897."

The United States have brought the case to this court for relief, assigning errors as follows: "(1) The district court erred in its findings of facts. (2) The district court erred in its findings of law. (3) The district court erred in allowing certain charges to be included in said findings of facts, which were not proper and legal charges. (4) The district court erred in allowing certain charges to be included in said findings of facts, when in truth and in fact such services warranting such charges were never performed by said court. (5) The district court erred in holding that plaintiff was entitled to recover the whole amount sued for by him, without deducting therefrom certain charges that were not lawful, and certain other charges for which the services were not performed, and therefore improper. (6) The district court erred in rendering judgment against the defendants, as shown by the record."

Thereafter, on leave of the court, the assignment of errors was amended, and additional errors assigned, as follows: "The district court erred in its findings of facts as shown in charge 14 in findings of facts, viz.: 'Charges for per diems to trying cases, $45.00.' See Transcript, p. 13. (8) That the district court erred in its findings of law. (a) In charge No. 1 of findings of facts and law, 'Charges for per diems for taking bail, under capias, etc., $160.00.' See Transcript, p. 12. (b) In charge No. 4, in finding of facts and law, 'Charge for filing mittimus sent to clerk, 10 cents.' See Transcript, p.

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12. (c) In charge No. 9, findings of facts and law, 'Excess of one folio in recognizances. These recognizances contained about seven folios, but the petitioner only charges for four folios, making his claim for this item, $172.90.' See Transcript, p. 13. (d) Charge No. 14 in finding of law and facts, 'Charge for per diems to trying cases, $45.00.' See Transcript, p. 13."

W. S. Reese, Jr., for the United States.

Geo. F. Moore, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PER CURIAM. This suit against the United States was brought under an act of congress entitled "An act to provide for the bringing of suits against the government of the United States," approved March 3, 1887. Supp. Rev. St. p. 559. The seventh section of that act provides that:

"It shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings of the court of the facts therein and the conclusion of the court upon all questions of law involved in the case and to render judgment thereon."

From the statement given above of the proceedings in the court a quo, it will be seen that, while an attempt was made to comply with the provisions of section 7 above quoted, yet there is no such specific finding of facts as to exhibit exactly the services for which the claimant asks compensation. One class of service for which judgment for $160 is given against the United States is described as, "Charges for per diems for taking bail under capias," etc. If these charges are for hearing and deciding criminal charges, for which the statute allows commissioners $5 per day for the time necessarily employed, they are within the statute; but from the finding of facts we cannot infer what they were for, nor how many days were occupied by the commissioner in thus taking bail under capias.

Another large item of the account going into the judgment is described as follows: "Charge for excess of one folio in recognizances. These recognizances contained about seven folios, but the petitioner only charged for four folios, making his claim for this item." Does this finding mean that this charge is for four folios in recognizances which contained seven folios, or for the three folios in excess of the four folios theretofore charged for? In short, the finding of facts is incomplete and obscure, and not in substantial compliance with the law. To do justice to the United States and to the appellee, and in the interest of both parties, the case should be reversed, and the cause remanded, to permit a specific finding of facts to be made.

It is proper to notice that the petition in this case, even as aided by the alleged bill of particulars, does not contain a succinct statement of the facts upon which the claim is based, as required by section 5 of the above-mentioned act of congress. The statements made in the petition are largely of a general nature, such as, "Per diems for taking bail only," "Charges for per diems in certain cases," "Charges of all fees in case v. Holloway"; and the bill of particulars attached is no more specific, and, being interspersed with auditor's memoranda, is of doubtful value, beyond showing that many

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items were rejected or suspended by the auditor for insufficient statement.

The original assignment of errors was of too general a nature to be in accordance with our rules. As amended, the errors complained of questioned the correctness of findings of fact, or mixed law and fact. The judgment of the district court is reversed, and the case is remanded, with instructions to grant a new trial.

(88 Fed. 59.)

MARION COUNTY v. COLER et al.

(Circuit Court of Appeals, Fifth Circuit. May 10, 1898.)

No. 690.

1. RES JUDICATA—ACTION ON COUNTY BONDS.
   Where a judgment has been recovered against a county on its refunding bonds, and subsequently mandamus has been issued to compel the levy of a tax to pay such bonds, the question of their validity is concluded as between the same parties, and cannot be again raised in a subsequent suit.
2. COUNTY JUDGE—VACANCY—APPOINTMENT BY COMMISSIONERS.
   In Texas, three out of four county commissioners have power to appoint a county judge to fill a vacancy, who will be a judge de facto, if not de jure.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

F. H. Prendergast and W. T. Armistead, for plaintiff in error.

W. S. Herndon and Ben B. Cain, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PER CURIAM. The defendants in error, W. N. Coler & Co., first sued Marion county on June 6, 1892, in the United States circuit court for the Eastern district of Texas, at Jefferson, on certain courthouse and jail bonds, and certain refunding bonds, and on certain "funding or Urquhart bonds." To that suit the county filed various defenses to the validity of the funding bonds. Said funding bonds were signed by J. M. Urquhart as county judge. The defense then set up was as follows: That the funding bonds were issued without any authority, and that the same were issued in redemption of false, fictitious, and void obligations against the county, and the plaintiffs were present when the same were issued and signed by this county judge of Marion county, and urged him, the said county judge, to sign the same, when they well knew that there was no consideration passing therefor, and that the said judge who signed said bonds was wholly incapacitated to do or perform any rational act at the time of the signing of said bonds, and the plaintiffs and their agents well knew this fact; that said bonds were issued in fraud of the defendant county, and are not valid claims against it.

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This defense was overruled, and judgment was rendered against the county in October, 1893, for the amount due on the funding bonds involved in that suit. The county appealed to the United States circuit court of appeals, and the judgment was affirmed. 14 C. C. A. 301, 67 Fed. 60. On August 3, 1895, W. N. Coler & Co. filed suit in the United States circuit court at Jefferson for a mandamus against Marion county to compel the county to levy a tax to pay the judgment recovered. In the mandamus suit the county pleaded as a defense that J. M. Urquhart, whose name appeared on said coupons sued on, being coupons from the funding bonds, was never at any date county judge of said county, and was never either elected or appointed, and was a volunteer only, entirely without power to bind the county. This defense was overruled, and the mandamus was awarded as prayed for. The county appealed said cause, and the judgment was affirmed in the United States circuit court of appeals. 21 C. C. A. 392, 75 Fed. 352. On May 13, 1895, the present suit was filed against Marion county by W. N. Coler & Co., in which they seek to recover against Marion county for about $10,000 due on the "funding or Urquhart bonds." The defendant answered in the present suit substantially as follows: That the funding bonds set out by plaintiffs are null and void, and are not binding bonds against the defendant, because said funding bonds of 1880 were never executed or signed by any officer authorized to sign the same and to bind the defendant county thereby; for that one Charles Haughn was the duly-elected county judge at that time, and had ceased by his own motion to act as such judge, and had begun to act as county attorney, after either vacating or attempting to vacate his office as county judge, in December, 1879, and on said day and date, by the action of only three out of four of the county commissioners, and in the absence of the judge, the said three commissioners undertook to appoint, and did appoint, one J. M. Urquhart as county judge, he being only a private citizen. In the absence of one of the commissioners, the three other commissioners appointed said Urquhart as judge; and the county alleged that three of the commissioners, in the absence of a county judge, had no power to fill the vacancy of the office of county judge, and its act in so doing was a nullity, and the subsequent act of the judge did not and could not bind the county; and that plaintiffs claim that by the signature of the said J. M. Urquhart the funding bonds are made valid and bind the county.

To this answer W. N. Coler & Co. filed the plea of res adjudicata, in effect, that the county was estopped from making this defense by reason of the judgment for the debt in the first suit on these bonds, and by reason of the judgment awarding the mandamus compelling the county to levy a tax to pay the first judgment. The court sustained the plea on the former adjudication as to the validity of the funding bonds, and directed the jury to return a verdict for the plaintiffs for the amount of the Urquhart bonds in suit.

We find no error in the ruling of the court. The validity of the Urquhart or funding bonds has been twice an issue between the same parties in the same court, and twice the decision has been against

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the plaintiff in error. On the facts admitted in the pleadings, J. M. Urquhart, at the time he signed the bonds and coupons in question, was county judge of Marion county de facto, if not de jure. The judgment of the circuit court is affirmed.

(88 Fed. 82.)

UNION RY. CO. et al. v. SPRAGUE ELECTRIC RAILWAY & MOTOR CO.

(Circuit Court of Appeals, Second Circuit. May 17, 1898.)

No. 108.

1. PATENTS—INFRINGEMENT—ELECTRIC RAILWAY MOTORS.
   In a patent for an electric railway motor, a claim describing the field magnet of the motor as "sleeved upon an axle" of the vehicle at one end is infringed by a construction in which flexible extensions from the field magnet are journaled upon the axle.
2. SAME—CONSTRUCTION OF CLAIMS.
   In a claim for the combination with a wheeled vehicle of an electro-dynamic motor flexibly supported from such vehicle, "and centered upon the driving axle thereof," the use of the word "centered" does not require a perfectly rigid union of axle and motor, but only that the center of movement of the motor shall always be the car axle.
3. SAME.
   The Sprague patent, No. 324,892, for an improved electric railway motor, covers, not a pioneer or broad invention, but a clearly-defined one, the gist of which consists in the utilization of the frame of the motor itself with the necessary extension, and the centering of the motor on the driven axle by extension pieces from the field magnet at one end, and in its flexible suspension, at the other end, to the car track, the armature being carried rigidly by the field magnet. Claims 2 and 6 of this patent are infringed by a motor made in accordance with the Short patent, No. 546,560, and claim 9 is not infringed.

This appeal is from a decree of the circuit court for the Southern district of New York, which adjudged that the defendants had infringed claims 2, 6, and 9 of letters patent No. 324,892, dated August 25, 1885, and issued to Frank J. Sprague, for an improved electric railway motor. 84 Fed. 641. The defendants' motor is made in accordance with letters patent No. 546,560, dated September 17, 1895, and issued to Sidney H. Short.

The three claims which the circuit court found to have been infringed are as follows:

"(2) The combination of a wheeled vehicle and an electro-dynamic motor mounted upon and propelling the same, the field magnet of said motor being sleeved upon an axle of the vehicle at one end, and supported by flexible connections from the body of the vehicle at the other end, substantially as set forth."

"(6) The combination, with a wheeled vehicle, supported upon its axles by springs, of an electro-dynamic motor flexibly supported from such vehicle, and centered upon the driving axle thereof, substantially as set forth."

"(9) The combination, with a wheeled vehicle, of an electro-dynamic motor centered upon the driving axle thereof at one end, a spring support for that end of the motor from the truck or body of vehicle, and relieving axle wholly or partly of dead weight, and a spring support for the other end of motor from the truck or body of vehicle, substantially as set forth."

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Chas. E. Mitchell and Wm. H. Kenyon, for appellants.
Fredk. H. Betts, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. As soon as the use of an electric motor for the propulsion of cars upon a street railway was thought to be attainable, divers methods were invented which were intended to enable the motor to act efficiently, economically, and certainly upon the car axle. At first, the motor was supported by or on the car body, and afterwards it was upheld upon a separate platform. The state of the art upon the subject is so fully stated by Judge Sanborn in Adams Electric Ry. Co. v. Lindell Ry. Co., 40 U. S. App. 482, 23 C. C. A. 223, and 77 Fed. 432, that it need not be restated here. Sprague hung the motor under the car body directly upon the axle of one of the pairs of wheels by an extension or solid bearing attached directly to the motor. He used a magnet having a yoke and pole pieces, and, by sleeving one end upon the axle, he caused the armature which was carried between the poles of the magnet to be held with firmness, and the armature shaft to be held in alignment with the car axle. The opposite end of the motor was upheld by springs extending to a crossbar on the truck frame. He also relieved the weight upon the axle by a spring support from the truck of the vehicle. The motor was thus hung below the car, one end being centered upon the axle, and the other end being flexibly attached by springs to the truck frame. The effect of the mode of construction is explained in the specification as follows:

"The armature being carried rigidly by the field magnet, these two parts must always maintain precisely the same relative position under every vertical or lateral movement of the wheels or of the car body; and, as the field magnet which carries the armature is itself centered by the axle of the wheels to which the armature shaft is geared, the engaging gears, also, must always maintain precisely the same relative position. At the same time the connection of the entire motor with the truck is through springs, so that its position is not affected by the movements of the truck on its springs."

The simplicity and comparative lightness of the general plan upon which this motor was constructed, and the adaptability of the means to the required result, made the motor successful, and other pre-existing methods of construction disappeared to a great extent.

The question of anticipation by a pre-existing electric railway motor may be laid out of the case, for it is not asserted that any patent prior to the date of the patent in suit described an electric motor geared to and propelling a vehicle, and supported at one end by sleeving extension pieces from the field magnet upon the driven axle, and at the other end by a flexible connection with the truck or body of the vehicle. Upon the question of nonpatentability, the defendants urge that substantially the same features of construction were shown in other than electric motors, and the patent to Charles W. Hermance, No. 111,644, dated February 7, 1871, for a steam road wagon, is relied upon as affording the closest analogy to the Sprague device. Upon the Hermance axle the rear end of a frame was hinged, the front end of which rested upon springs which were attached to beams which were also attached to the axle. The boiler, engine, and machinery

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were all attached to this frame, which was above the car frame, and which suspended the entire parts and permitted vertical motion. The Sprague device discarded frames, and hung the motor by extension pieces from the magnet directly to the car axle. Hermance and the electric motor patentees who followed the same line of construction hung the motor upon a frame which was hung upon the axle. An inspection of the Hermance wagon would not suggest an abandonment of independent frames and a construction which compelled the motor to be its own frame, and we see nothing in his wagon, or in the other steam wagons in the record, which diminishes the patentable character of the Sprague method of construction.

The defendants' field magnet is cylindrical, and surrounds the armature. "The yoke or neutral part of the field magnet forms the exterior portion thereof, and is extended around and over the ends, so as to complete the casing within which the armature and the other portions of the field magnet are contained. The motor, therefore, appears like a small barrel or cylinder of iron, the surface of which is magnetically neutral." In their structure the extension from the field magnet towards the car axle is not rigid with the field magnet, but is jointed thereto, being for this purpose of a U shape, the base of the U being journaled on the car axle, and the two arms of the U being jointed to the opposite lateral sides of the motor, which is embraced between them. A form of the defendants' method of suspension is described in one of the advertisements of the Walker Company as follows:

"B is a U-shaped frame, the rounded end of the U being journaled on the car axle in the ordinary way. Swinging freely between the arms of this U is the motor, A, trunnioned by its bearing cases. The motor is then supported at the rear by spiral springs, C, between the lugs on the frame—which have a factor of safety in strength of twenty—and the arms of the U. This feature is also shown in figure 3. At the front end it is supported by a swinging arm from the ordinary spring truck bar, D."

The three points which the defendants' experts regard as patentably distinguishing their motor from the Sprague invention, as described in claims 2 and 6, are that their field magnet is not sleeved upon the axle, as required in claim 2, and that their motor is not centered upon the driving axle, as required in claim 6; and, as a part of the same proposition, that their field magnet is not so centered, and that their motor, being in the form of a drum, is not equipped with ends, as required in claim 2. The third point may be dismissed as trivial.

The Sprague invention was not a pioneer, and was not of a broad character, but it was a distinct and clearly-defined invention, in the method of hanging electric motors for vehicles, and its gist consisted in the utilization of the frame of the motor itself with the necessary extension, and the centering of the motor on the driven axle by extension pieces from the field magnet at one end, and in its flexible suspension at the other end to the car truck, the armature being carried rigidly by the field magnet.

The question of the infringement of claim 2 is of the most importance; for, if the defendants' jointed attachment of their motor to the axle of the vehicle is not the sleeving of claim 2, it would

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almost necessarily follow that the defendants' centering of the motor is accomplished in a substantially different way from that of the patent. Sprague bolted the extension piece from his motor to the axle, and hung his motor upon the axle by a connection which might be called rigid. Short hung his barrel-shaped motor to the axle by journaling the rounded end of the U-shaped extension to the car axle, and jointing the two arms of the U to the opposite lateral sides of the motor, and thus his extensions from the field magnet to the axle are flexible, and the motor can rock or tip towards and from the axle, which is esteemed to be a noteworthy improvement. The defendants insist that, inasmuch as the motor is hung by extensions to trunnions upon its opposite sides, it is not sleeved to the axle, because sleeving, as described in the patent, is by a rigid attachment; and that if the magnet is sleeved upon the axle it has no capacity of up and down movement relatively to the axle, except at the unsleeved end. This construction presupposes that Sprague's invention consisted in the details by which he attached his motor or his magnet to the axle. If it did so consist, the defendants are right, but the invention was more than a matter of form or detail. The part of the invention now under consideration consisted, as has been said, in utilizing the frame of the motor, and hanging it by its necessary extensions from the field magnet at one end to the axle; and, while it is true that the patentee showed a rigid extension, his claim did not tie up that part of the invention to rigidity. A jointed and a flexible extension is not only within the invention, but within the claim.

The defendants also say, in this part of the case, that the field magnet is required by claim 2 to be sleeved upon the axle, and that their magnet is not so sleeved because the trunnions from which the side arms extend are not parts of the field magnet, and the side arms which extend from the trunnions to the axle are not extensions from the field magnet. In the Sprague motor, the field magnet, by means of extensions from the pole pieces, is sleeved upon the axle, whereas in the defendants' motor extensions from the exterior shell, which is mechanically integral with the yoke of the magnet, are journaled or sleeved upon the axle. This supposed difference, which mainly results from the use of a different shape of magnet and of motor, is of an unsubstantial character with regard to infringement.

The next point is in regard to the use of the word "centered" in claim 6. The defendants say that "centering" means fixing upon a central point, and that the motion of the patented extension must be limited to the motion of the axle, whereas the arms of their U are yielding, and their motor swings between them. By the use of the word "center," a perfectly rigid union of axle and motor was not demanded, but it was intended that the center of the movement of the motor was always to be the car axle, and the defendants' motor is thus centered. Its yielding movement is in an arc of which the driving axle is the center, and therefore its driving gears retain the same relative position, which is the effect of the centering of the Sprague magnet, as stated in the extract from the specification which

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has already been quoted. The specification of the Short patent describes the movement of its motor as follows:

"Any yielding movement of the motor in either direction, either upwardly or downwardly, being in the arc of a circle of which the driving axle is the center and the supporting frame the radius, it follows that the driving gears will always retain the same relative positions, and be kept in perfect mesh throughout all adjustments and positions of the motor."

The various discussions by the defendants in regard to infringement, except the one in regard to sleeving by a rigid extension, are discussions in regard to words, and not in regard to things. The difference between a rigid attachment and a jointed and flexible attachment to the axle has a reality with relation to this invention which is lacking in the other alleged differences, but the difficulty with that part of the defendants' case is that the Short device is an improvement upon the Sprague invention, which was of a broader character than the defendants interpret it to have been.

Claim 9 requires a spring support for the axle end of the motor from the truck or body of the vehicle. The specification says that the springs, known as "springs M," extend to crossbars on the truck frame, or to the car body, in case no truck is used. The spring supports on the axle end of the defendants' motor are from the car axle. It is true that the car axle is held in the truck, but the claim made it imperative that the support for that end must be from the truck or body of the vehicle, and the specification describes the same method of construction. We think that claim 9 was not infringed.

The decree should be modified, with costs of this court to the appellants, by limiting the injunction and the accounting to claims 2 and 6; and the case is remanded to the circuit court, with directions to enter a modified decree in accordance with the foregoing opinion, with costs of that court.

(88 Fed. 91.)

WHITMIRE v. COBB.

(Circuit Court of Appeals, Fifth Circuit. May 24, 1898.)

No. 659.

1. SALVAGE—WHEN ALLOWED.
   Timber found drifting with the tide, on deep water, in a harbor, and out of control of the owners, is the subject of salvage.
2. SAME—AMOUNT OF RECOVERY.
   Upon proof that the public custodian of lost timber, who himself was entitled to demand 75 cents per stick for timber recovered, paid regularly to salvors 50 cents per stick for timber turned over to him, the court allowed a salvor 50 cents per stick as against the owner of the timber. *Held* no abuse of discretion.

Appeal from the District Court of the United States for the Northern District of Florida.

On July 7, 1896, a storm swept over the western part of Florida, taking in its course the mouths of Escambia River and Escambia Bay, an arm of Pensacola Bay. At Ferry Pass, on one of these mouths of the river, there were several thousand sticks of timber gathered together which were cast adrift

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by the storm, and carried by the wind and tide out into the waters of Escambia Bay. Two hundred and forty-one of these sticks, scattered along the eastern shore of Escambia Bay near Garcon Point, for a distance of one and one-half miles, were collected together by the appellee, N. H. Cobb, assisted by his three children and one man. According to his statement, Cobb worked three days in gathering two hundred pieces, and collected the balance during a period of two weeks' time. The man employed by Cobb to assist him worked one-half day. The timber was afterwards taken by Whitmire, the appellant. Thereupon the appellee filed a libel against the timber in the United States district court for the Northern district of Florida. Whitmire interposed a claim and filed his answer. Upon the hearing upon the merits the district judge awarded Cobb, the appellee, the sum of $120.50, or 50 cents per stick, as salvage, and the costs. From this decree Whitmire appeals to this court, assigning error as follows: "The district judge erred (1) in rendering a decree for the libelant; (2) in rendering a decree for so much as the sum of one hundred and twenty dollars in favor of the libelant and against the claimant; (3) in rendering a decree of any sum whatever in favor of the libelant against the claimant; (4) in not dismissing the libel."

W. A. Blount and A. C. Blount, for appellant.

B. C. Tunison, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PER CURIAM. The assignments of error raise two questions: Is the case made by the libel one of salvage? and whether the amount allowed by the district court is erroneous, because excessive.

Timber found drifting with the tide on deep water, in the harbor and out of the control of the owners, is the subject of salvage. Bywater v. A Raft of Piles, 42 Fed. 917. See, also, Muntz v. A Raft of Timber, 15 Fed. 555; A Raft of Spars, 1 Abb. Adm. 485, Fed. Cas. No. 11,529; Fifty Thousand Feet of Timber, 2 Lowell, 64, Fed. Cas. No. 4,783. Following these decisions, we hold that the case made by the libel is one of salvage.

As to the amount allowed: While we are of opinion that the salvage services in question were of a low order, and would have been adequately compensated on the basis of work and labor, yet we cannot hold that the amount allowed was so manifestly excessive as to justify its revision on appeal. The district judge acted upon proof that the public custodian of lost timber and lumber, who himself was entitled to demand and receive for each stick of timber recovered and delivered 75 cents, paid regularly to salvors of timber 50 cents per stick turned over to him. While the price paid by the public custodian was arbitrary, and not based upon services actually rendered, yet we are not prepared to say the district judge, in adopting it, proceeded upon a wrong principle or abused the discretion vested in him. The decree appealed from is affirmed.

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(88 Fed. 97.)

HARLESS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. June 20, 1898.)

No. 1,050.

CIRCUIT COURTS OF APPEAL—CRIMINAL JURISDICTION—CRIMES IN INDIAN TERRITORY.

In the act of March 1, 1895, creating a court of appeals for the Indian Territory, and giving it full jurisdiction, civil and criminal, the provision of section 11 that "writs of error and appeals from the final decision of said appellate court shall be allowed, and may be taken to the circuit court of appeals for the Eighth judicial circuit, in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States," conferred upon that court full appellate jurisdiction, including that in cases of infamous crimes, which was theretofore vested in the United States supreme court.

In Error to the United States Court of Appeals in the Indian Territory.

Thomas Marcum, Thomas Owen, J. H. Koogler, John Watkins, William M. Mellette, and Edgar Smith, for plaintiff in error.

P. L. Soper, U. S. Atty. (L. F. Parker, Jr., Asst. U. S. Atty., on brief), for the United States.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. Plaintiff in error was indicted in the United States court, in the Indian Territory, for larceny and receiving stolen property, and, upon trial, was found guilty, and sentenced to imprisonment for two years and six months. By appeal he carried the case before the United States court of appeals for the territory, by which the sentence and judgment of the trial court were affirmed; and thereupon a writ of error from this court was sued out to the territorial appellate court, and, the transcript having been duly filed in this court, the United States now moves for a dismissal of the writ, on the ground that a writ of error will not lie from this court to the appellate court of the Indian Territory in cases of infamous crimes, or, in other words, that jurisdiction in this court does not exist in cases of infamous crimes committed in the Indian Territory.

In support of the motion to dismiss, it is argued that under the provisions of the act of March 3, 1891, creating the courts of appeal, jurisdiction in cases of infamous crimes was not conferred upon the courts of appeal, but by section 5 of the act was conferred upon the supreme court, and that it was not until the adoption of the act of January 20, 1897 (29 Stat. 492), amendatory of the act of 1891, that the circuit courts of appeal could entertain jurisdiction in cases of infamous crimes, and that this amendatory act has only the effect of transferring to the several circuit courts of appeal the then existing jurisdiction of the supreme court over cases of infamous crimes, and that, when this act took effect, the supreme court did not have

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jurisdiction over such cases in the Indian Territory, because the jurisdiction conferred upon the supreme court over such cases in the Indian Territory, by the act of 1891, had been taken away by the subsequent act of March 1, 1895 (28 Stat. 693), creating an appellate court for the territory, and, therefore, there was no existing jurisdiction in the supreme court in such cases to be transferred to this court by force of the provisions of the act of 1897.

In determining the question of the extent of the jurisdiction of this court over the courts of the Indian Territory, regard must be primarily paid to the acts of congress creating and enlarging, from time to time, the courts and judicial system of the territory.

Previous to the adoption of the act of March 1, 1889 (25 Stat. 783), creating a United States trial court in the Indian Territory, the jurisdiction in criminal cases arising in the territory was apportioned between the United States courts in the Northern district of Texas, the Western district of Arkansas, and the district of Kansas. No appeal or writ of error was provided for until the adoption of the general act of February 6, 1889 (25 Stat. 655), which authorized the issuance of the writ of error from the supreme court to any court of the United States in capital cases. By the act of March 1, 1889, a United States trial court was created for the territory; and by section 5 of the act it was declared "that the court hereby established shall have exclusive original jurisdiction over all offenses against the laws of the United States committed within the Indian Territory, as in this act defined, not punishable by death or by imprisonment at hard labor"; thus leaving the jurisdiction in the latter class of cases in the United States courts of Texas and Arkansas.

The act of May 2, 1890 (26 Stat. 81), enlarged the jurisdiction of the trial court of the territory by putting in force therein the provisions of chapter 45 of the General Laws of the State of Arkansas, entitled "Criminal Law," and conferring jurisdiction over the offenses therein defined upon the territorial court, subject to the proviso that the United States courts in the Eastern district of Texas and Western district of Arkansas "shall continue to exercise exclusive jurisdiction over all crimes and misdemeanors against the laws of the United States applicable to the said territory, which are punishable by the laws of the United States by death or by imprisonment at hard labor, except as otherwise provided in the following sections of this act." These sections, numbered 34, 35, and 36, conferred upon the territorial court jurisdiction over many infamous offenses, so that in effect the jurisdiction over this class of cases was apportioned between the territorial court and the courts of the Eastern district of Texas and Western district of Arkansas, being in some instances concurrent. By section 42 of the act it was declared "that appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the supreme court of the United States, in the same manner and under the same regulations as from the circuit courts of the United States, except as otherwise provided in this act."

The next act in sequence of time, affecting the question, is that of March 3, 1891 (26 Stat. 826), creating the circuit courts of appeals,

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which provided, in section 5, that writs of error from the supreme court might be taken to the circuit and district courts in cases of conviction of a capital or otherwise infamous crime, and in other criminal cases jurisdiction was conferred on the proper circuit court of appeals. By section 13 of the act it was provided that appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the supreme court of the United States, or to the circuit court of appeals in the Eighth circuit, in the same manner and under the same regulations as from the circuit and district courts of the United States under this act. In McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. 118, it was held that this act "provides for the distribution of the entire appellate jurisdiction of our national judicial system between the supreme court of the United States and the circuit court of appeals, therein established, by designating the classes of cases in respect of which each of those courts shall respectively have final jurisdiction." It thus clearly appears that, if the case now under consideration had been heard in the trial court of the territory at any time when these provisions of the act of 1891 were in force in the territory, the case could have been carried by writ of error before the supreme court. In other words, when the act of 1891 took effect, the supreme court had jurisdiction, by writ of error, in all cases wherein a conviction for an infamous crime was had in any circuit or district court of the United States or in the United States court in the Indian Territory.

By the provisions of the act of January 20, 1897 (29 Stat. 492), the jurisdiction over cases of infamous crimes is taken away from the supreme court, and is conferred upon the circuit courts of appeals; so that there can be no question that had the conviction in the case now before the court been had in a circuit or district court of the United States, subsequent to January 20, 1897, this court would have had jurisdiction therein. It is contended, however, that this jurisdiction does not exist over infamous cases arising in the Indian Territory, on the ground that the act of March 1, 1895 (28 Stat. 693), had deprived the supreme court of jurisdiction over infamous crimes in the Indian Territory, and therefore the act of 1897 did not confer this jurisdiction on this court, it being in terms limited to cases arising in the district and circuit courts. The act of 1895 was practically intended to create a judicial system for the Indian Territory. It enlarged the civil jurisdiction of the trial court, and by section 9 it deprived the courts of Texas, Arkansas, and Kansas of all criminal jurisdiction after September 1, 1896, over cases arising in the territory, and conferred the entire criminal jurisdiction, after that date, on the territorial court. In re Johnson, 167 U. S. 120, 17 Sup. Ct. 735. In section 11 it provided for a court of appeals for the territory, and enacted that all appeals and writs of error in criminal cases should be taken to the appellate court created by the act; and it is by reason of this provision that it is contended that the pre-existing jurisdiction of the supreme court over convictions in infamous cases was terminated, and therefore the act of 1897 did not transfer jurisdiction to this court, in such cases arising in the territory, because no such jurisdiction then existed in the supreme court. But the jurisdiction

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of this court is not dependent upon the provisions of the act of 1897, but upon those of section 11 of the act of 1895, which, after creating a court of appeals for the territory, and for the taking of all cases, civil and criminal, to that court from the trial court on appeal or writ of error, further enacts that "writs of error and appeals from the final decision of said appellate court shall be allowed, and may be taken to the circuit court of appeals for the Eighth judicial circuit, in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States." Thus, we have a specific grant to this court of jurisdiction over the final decisions of the appellate court of the territory, which may be said to be open to two constructions: First, that it is a grant of jurisdiction over every case finally decided by the appellate court, the latter clause of the paragraph being intended to point out the manner and method for securing the right of appeal created by the preceding portion of the sentence or paragraph; or, second, that it is a grant of jurisdiction over the final decisions of the appellate court in all cases wherein jurisdiction in this court would exist if the decision had been rendered in a circuit court of the United States.

If the first construction is the proper one, then the jurisdiction of this court is beyond all fair question; and we are of the opinion that this is the true meaning of the clause under consideration. Section 11 of the act creates a court of appeals for the territory, and enacts that it shall have the same supervisory power over the trial courts as is possessed by the supreme court of Arkansas over the trial courts of that state; and, appellate jurisdiction in civil and criminal cases having been thus conferred, it is then enacted that writs of error and appeals from the final decision of said appellate court shall be allowed, and may be taken to this court, in the same manner and under the same regulations as appeals are taken from the circuit courts. The natural construction of this clause makes it include all final decisions of the appellate court. The clause was enacted to confer an appellate jurisdiction upon this court over the territorial appellate court. When this subject-matter was before congress for consideration, two questions would naturally arise: First, what shall be the extent of the jurisdiction proposed to be conferred upon the court of appeals for the Eighth circuit over the decisions of the territorial court; and, second, how shall this jurisdiction be exercised? The first question was answered by enacting that "writs of error and appeals from the final decision of said appellate court shall be allowed and may be taken to the circuit court of appeals for the Eighth judicial circuit"; and the second question was answered by the words, "in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States." The words creating the appellate jurisdiction in this court are general in their import, and it is difficult to see in what way a more unlimited jurisdiction could have been created in this court over the final decisions of the territorial court than is provided for in this clause of the section; and the contention that the addition of the words "in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States" must be construed to be a lim-

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itation upon the previously granted jurisdiction is not well founded. They refer solely to the mode in which the previously granted right of appeal is to be exercised.

The distinction to be made between statutes containing a general grant of jurisdiction and those intended to be limited to particular cases only is well illustrated by the statutes construed by the supreme court in the cases of In re Heath, 144 U. S. 92, 12 Sup. Ct. 615, and Folsom v. U. S., 160 U. S. 121, 16 Sup. Ct. 222, cited and relied upon by counsel for the government. In the former case a writ of error from the supreme court of the United States to the supreme court of the District of Columbia was sought under the provisions of section 846 of the Revised Statutes of the District of Columbia, which enacts that "any final judgment, order or decree of the supreme court of the district may be re-examined and reversed or affirmed in the supreme court of the United States upon writ of error or appeal, in the same cases and in the like manner as provided by law in reference to the final judgments, orders and decrees of the circuit court of the United States." This statute, by the use of the apt words "in the same cases," clearly restricted the appellate jurisdiction of the supreme court over the judgments of the supreme court of the District of Columbia to the cases in which appellate jurisdiction existed over judgments of the circuit courts of the United States. In the case of Folsom v. U. S., a case certified from this court to the supreme court, and involving the question whether this court had jurisdiction to review the judgment of the supreme court of the territory of New Mexico in cases of infamous crimes (the case arising before the adoption of the act of 1897), it was held by the supreme court that the question turned upon the construction to be given to section 15 of the act of 1891, creating the circuit courts of appeals, which in substance provides that, in cases wherein the decision of the court of appeals is made final by section 6 of the act, that court shall have the same right to review the final judgments of the supreme courts of the several territories as is conferred by the act to review the judgments of the district and circuit courts. The supreme court held that this section did not include a general grant of jurisdiction, but that it was specific and limited, and did not extend to the decisions of the territorial court of New Mexico, in cases of infamous crimes, because such jurisdiction did not then exist in the court of appeals in cases pending in the district and circuit courts.

The restrictive terms found in the statutes construed in these cases are not found in the act creating the judicial system for the Indian Territory. The provisions of section 11 of the act creating the court of appeals for the territory, and conferring jurisdiction thereon over cases heard in the trial courts, do not refer to the jurisdiction of the district and circuit courts of the United States, and the extent of the jurisdiction of the territorial court of appeals is not in any particular controlled by the statutes creating the jurisdiction of the district and circuit courts; and, when the section proceeds to declare that the final decisions of the territorial appellate court may be reviewed in this court, it can only refer to final decisions rendered by the appellate court in the exercise of the jurisdiction conferred on

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it by the preceding portions of the section, which jurisdiction, as already stated, is not in any way measured or limited by the jurisdiction of the district or circuit courts; and therefore, if we give to the words creating the appellate jurisdiction of this court their plain and ordinary meaning, it must be held that the jurisdiction of this court extends to all final decisions rendered in the territorial appellate court. Unless this is the proper construction of the act, it follows that the decisions of the territorial appellate court in convictions for infamous crimes cannot be appealed from, but that an appeal to this court does exist in all cases not infamous. It is true that, if the language of the statute demands this construction, the court is not justified in refusing to follow the plain meaning of the statute, by reason of the apparently absurd result caused thereby. Folsom v. U. S., 160 U. S. 121, 16 Sup. Ct. 222. It is equally true that, if the words of a statute are susceptible of more than one meaning, the absurdity of the result of one construction is a strong argument against its adoption. Thus, in Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517, it is said: "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." No reason can be assigned in support of the view that congress intended to deny an appeal in cases of infamous crimes, and to confer it in cases of misdemeanor; and therefore no reason exists for construing the clause of section 11 of the act of 1895, which confers jurisdiction upon this court over the final decisions of the appellate court of the territory, in such a manner as to confer jurisdiction in minor cases, while denying it in cases of greater importance. If the language of the section was such as to clearly show that jurisdiction was not conferred upon this court in the latter class of cases, then it could not be inferred simply to avoid an apparently absurd result (Folsom v. U. S., supra); but when, as in this case, the words of the section conferring the jurisdiction are broad enough to include convictions for infamous and noninfamous crimes alike, the court is not required to give an enlarged meaning to the words "in the same manner and under the same regulations as appeals are taken from the circuit courts," in order that the jurisdiction over convictions for infamous crimes shall be denied, while it exists over cases of less gravity. We hold, therefore, that section 11 of the act of 1895 confers upon this court appellate jurisdiction over the final decisions of the court of appeals of the Indian Territory; and, so holding, it follows that the motion to dismiss for want of jurisdiction must be, and is, overruled.

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(88 Fed. 102.)

CAMPBELL v. WAITE.

(Circuit Court of Appeals, Eighth Circuit. June 13, 1898.)

No. 1,018.

1. HABEAS CORPUS—PRISONER HELD BY STATE FOR ACTS DONE UNDER FEDERAL AUTHORITY.

The federal courts may, on habeas corpus, release a person after his conviction by a state court, as well as before trial, when he is in custody for an act done in pursuance of a law of the United States lawfully enacted.[1]

2. SAME.

Rev. St. § 753, was designed to give relief to one in custody under a state law, not only when a state statute expressly imposes a penalty for executing a law of the United States or the process of its courts, but also when the state law is general in its terms, and applicable to all persons, and one is in custody under color thereof for an act which was in fact done in pursuance of federal authority.

3. SAME.

When, on habeas corpus, a person claims immunity from arrest and imprisonment, on the ground that he is held for an act done under federal authority, the federal courts may go behind the indictment or information found in the state court, and ascertain by independent inquiry whether the act which furnished the sole basis for the charge was in truth done in pursuance of a law of the United States.

4. SAME.

The arrest, under state authority, of federal officers or other persons for acts lawfully done in discharge of their duties under federal laws, presents a case of urgency, which warrants a discharge of the prisoner on habeas corpus without remitting him to the slower remedy of an appeal to the United States supreme court.[2]

Appeal from the District Court of the United States for the Northern District of Iowa.

Edward F. Waite, the appellee, filed an application for a writ of habeas corpus in the United States district court for the Northern district of Iowa, in which he alleged, in substance, that he was unlawfully restrained of his liberty by A. C. Campbell, the sheriff of Howard county, Iowa, under a warrant issued by the district court of said county; that he was held in custody and wrongfully deprived of his liberty "for an act done in pursuance of the laws of the United States"; and that the restraint so imposed "was in violation of the constitution and laws of the United States, the courts of the state of Iowa having no jurisdiction to arrest or imprison him." A writ of habeas corpus having been duly issued and served, said A. C. Campbell, the appellant, made a return to the writ, stating, in substance, that he held the said Waite in custody by virtue of a warrant of commitment issued on a judgment of the district court of Howard county, Iowa, which was rendered on June 22, 1895, and that said judgment after its rendition had been duly affirmed on appeal by the supreme court of the state of Iowa. Attached to said return were duly-certified copies of the judgment of the district court of Howard county, of the indictment on which the said Waite had been tried, of the judgment of affirmance by the supreme court of the state, and of the warrant of commitment under which the accused was held.

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[1] As to jurisdiction of federal courts on habeas corpus generally, see note to In re Huse, 25 C. C. A. 4.

[2] As to jurisdiction of federal courts on habeas corpus to release federal officers prosecuted in state courts, see section 10 of note to In re Huse, 25 C. C. A. 4.

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The indictment appears to have been based on section 4767 of the Code of Iowa of 1897, quoted below in the margin,[3] and charged, in substance, that E. F. Waite, at and within said county of Howard, on or about the 4th day of October, A. D. 1894, did willfully, maliciously, unlawfully, and feloniously threaten verbally to accuse one D. P. Andrus, a person then and there being and residing in Howard county, Iowa, of the crime of perjury, and to have him arrested and punished therefor, in order to compel the said Andrus to do an act against his will. To the aforesaid return a reply was filed by the petitioner, wherein he admitted that he had been indicted, tried, and convicted in the district court of Howard county, Iowa; that the judgment of said court had been subsequently affirmed by the supreme court of the state (70 N. W. 596); and that he was then in custody by virtue of a warrant issued on said judgment. He averred, however, in substance, that the judgment of the state court, by virtue of which he was held in custody, was utterly null and void and of no force or effect, because the acts complained of in the indictment on account of which he had been accused and convicted were acts which he had done and performed as a special examiner of pension claims in the discharge of duties that were imposed upon him as such examiner by the laws of the United States. In support of this general averment, the petitioner alleged, in substance, the following facts: That, at the time of the commission of the alleged offense against the laws of the state of Iowa, he was a special examiner of the pension bureau, and, as such, had authority to administer oaths and take affidavits in the investigation of claims pending before the commissioner of pensions, and was charged with the duty of examining pension claims and aiding in the prosecution of persons appearing on such investigations to be guilty of fraud in presenting or procuring the allowance of claims for pension; that one Daniel P. Andrus, of Howard county, Iowa, was at the time a pensioner of the United States, and an applicant before the pension bureau for an increase of his pension; that three letters had been filed by said Andrus in support of his claim for an increased pension; that the duty had been devolved on the petitioner, by order of the commissioner of pensions, of investigating the merits of said claim; that, in the discharge of that duty, the three letters aforesaid and other evidence in support of the claim came into the possession of the petitioner; that, upon an examination thereof, he had good reason to believe, and did believe, that one or more of said letters were false and fraudulent, in that they had been written long after the time when they purported to have been written; and that it thereupon became his duty, as special examiner in charge of said claim, to visit said Andrus, and ascertain from him, by a statement under oath, the true date when the said letters were written. The petitioner further alleged that, for more than one year prior to the date last aforesaid, he had been engaged with other special examiners in investigating many pension claims originating in Howard county, Iowa, and in that vicinity, in which one George M. Van Leuven, a resident of that county, had acted as attorney in prosecuting said claims before the pension department; that so many frauds had been unearthed in the course of such investigation, many of which had been committed at the instance of said Van Leuven, without any intentional wrongdoing on the part of the applicants, that it was deemed inexpedient and impracticable to prosecute all persons concerned therein; that general instructions had accordingly been given by the commissioner of pensions to obtain all material evidence that could be obtained respecting the conduct of said Van Leuven and other persons who had acted in an official capacity, as examining surgeons, who might have been concerned in said frauds, to the end that they might be duly prosecuted, but that no prosecutions should be recommended or set on foot by special examiners of

[3] If any person, either verbally or by any written or printed communication, maliciously threaten to accuse another of a crime or offense, or to do any injury to the person or property of another with intent to extort any money or pecuniary advantage whatever, or to compel the person so threatened to do any act against his will, he shall be imprisoned in the penitentiary not more than two years or be fined not exceeding five hundred dollars.

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the pension department against individual pensioners who confessed their fraud, except in extreme cases where the frauds perpetrated appeared to have been gross and willful; that, acting in line with such general instructions of the commissioner of pensions, the petitioner visited said Andrus, in Howard county, Iowa, with a view of ascertaining whether the aforesaid letters which were believed to be fraudulent were in fact written on the date which had theretofore been alleged by the pension claimant, to wit, in the year 1864, or at a much later date; that, on the occasion of said interview, the petitioner requested said Andrus to make a truthful statement concerning said letters and the dates when they were written, and said to him, in substance, "that if he, the said Andrus, should not tell the truth about said letters, and if it should conclusively appear thereafter from other sources that he had made false statements under oath concerning said letters, then he, the said petitioner, would recommend the criminal prosecution of said Andrus for perjury," the fact being that Andrus had theretofore stated under oath, in a deposition taken before a special examiner of the pension bureau in support of his claim for a pension, that said letters were written by him during the year 1864, which statement was material to the allowance of the claim, and constituted the crime of perjury, under the laws of the United States, provided it was false and was known to said Andrus to be false when the same was made. The reply further disclosed, in substance, that the acts aforesaid, as described by the petitioner, and no other or different acts, constituted the alleged offense for which he had been indicted, tried, convicted, and sentenced in the district court of Howard county, Iowa. The respondent below, who is the appellant here, demurred to the foregoing plea, and also moved to strike out material parts thereof, but each was overruled. A hearing was then had on the issues tendered by the plea; considerable evidence was offered by the petitioner in support thereof; and, at the conclusion of the hearing, the petitioner was discharged from custody. 81 Fed. 359. The case comes to this court on appeal from such order.

Milton Remley, Atty. Gen. of Iowa, for appellant.

Edward C. Stringer, U. S. Atty., Fred W. Reed, and Daniel Fish, for appellee.

Before SANBORN and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is contended on behalf of the appellant, and it seems to be one of the principal errors which is relied upon for a reversal of the order of the district court, that the facts alleged in the petitioner's reply to the sheriff's return, hereafter termed the "petitioner's plea," were insufficient to warrant his discharge from custody, and that the trial court erred both in overruling the demurrer thereto and in admitting testimony to substantiate the averments of the plea. In support of this contention it is said, in effect, that the plea which was interposed was inconclusive and of no avail, because it did not admit the doing of the acts charged in the indictment, and, furthermore, show by proper averments that they were done in obedience to the laws of the United States, but that the plea merely admitted the doing of certain other acts, quite different from those described in the indictment, and then averred or showed that such other acts were done in pursuance of federal authority. We think, however, that the plea was not bad for the reasons last indicated. It is manifest from an inspection of the pleading that it was not framed with a view of confessing and avoiding the specific charge contained in the indictment, but that it was framed upon an entirely different theory, namely, for

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the purpose of showing that the petitioner was not guilty of the specific acts described in the indictment; that the acts by him done and performed, which had furnished the sole basis for a criminal charge under the laws of the state, were done by the petitioner in the line of his duty as a federal officer; and that by reason of that fact the federal court, to which the application for a writ of habeas corpus was addressed, was fully empowered by sections 751, 753, and 761 of the Revised Statutes of the United States to release him from imprisonment, notwithstanding his prior conviction as for a crime in the courts of the state of Iowa. The plea seems to have been well conceived for the purpose last indicated, and it admits of no controversy, we think, that the acts which were confessed by the plea, considering all the circumstances under which the petitioner was called upon to act, were within the line of his duty as a special examiner of the pension bureau, the same having been done in accordance with regulations lawfully made and instructions given by the commissioner of pensions, and therefore having been done and performed in pursuance of the laws of the United States.

It is insisted, however, in behalf of the appellant, that the action taken by the trial court sets at naught the solemn adjudication of the courts of Iowa in a case properly within their jurisdiction, and that, because of this fact, the order discharging the petitioner was erroneous and beyond the power of the trial court. The answer to this contention is found in the fact that by section 7 of the act of March 2, 1833 (4 Stat. 632, c. 57), the substance of which is now embodied in section 753 of the Revised Statutes, the congress of the United States has expressly authorized the federal courts to issue writs of habeas corpus for the release of persons who are confined or imprisoned "for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree of any court or judge thereof." By means of numerous federal adjudications upon this act, which have been cited and approved by the supreme court of the United States, it is now well established: First, that the federal courts may release a person after his conviction by a state court as well as before a trial, when he is restrained of his liberty for an act done in pursuance of a law of the United States lawfully enacted; second, that the statute in question was designed to give relief to one in custody under a state law, not only when a state statute expressly imposes a penalty for executing a law of the United States or the process of its courts, but also when a state law is general in its terms, and applicable to all persons, and one is in custody under color thereof for an act which was in fact done in pursuance of federal authority; and, third, that, when an indictment charging an offense against a state law does not show on its face that the act which forms the basis of the charge was done in pursuance of a law of the United States, that fact may be established by proof aliunde,—in other words, that when, in a proceeding by habeas corpus, a person claims immunity from arrest and imprisonment on the ground that he is in fact held for an act done in pursuance of federal authority, the federal courts may go behind the indictment or information, as the case may be, and ascertain by an independent inquiry

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whether the act which furnishes the sole basis for the charge was in truth done in pursuance of a law of the United States, or the order, process, or decree of a federal tribunal. If the federal courts did not possess the power last mentioned, the habeas corpus act would in some cases prove ineffective to protect federal officers in the performance of their duties. In re Hurst, 2 Flip. 510, 12 Fed. Cas. 1024; Brown v. U. S., 2 Woods, 428, 4 Fed. Cas. 98; U. S. v. Jailer, 26 Fed. Cas. 571, 575, 2 Abb. (U. S.) 265; Ex parte Thompson, 1 Flip. 507, 23 Fed. Cas. 1015, 1016; Ex parte Jenkins, 2 Wall. Jr. 521, 13 Fed. Cas. 445; In re Bull, 4 Dill. 323, 328, Fed. Cas. No. 2,119; In re Neill, 8 Blatchf. 156, 17 Fed. Cas. 1296. It was also decided in Re Neagle, 135 U. S. 1, 75, 10 Sup. Ct. 658, where most of the foregoing cases were cited and approved, that no act done in pursuance of a law of the United States lawfully enacted can be an offense against the laws of a state, and that an act done in obedience to rules or regulations lawfully prescribed by one of the executive departments of the government or in obedience to the directions of one of the heads of such departments, acting within the scope of his authority, is to be regarded as an act done in pursuance of a law of the United States, although no statute of the United States has in express terms directed the doing of the act. It may be conceded that the act of congress of March 2, 1833, which empowers the federal courts to go behind an indictment found in a state court, and determine by an independent investigation of the facts whether the act which forms the basis of the criminal charge was done in pursuance of federal authority, confers a delicate and anomalous power on the federal courts, which should in all cases be cautiously exercised; but, in view of the numerous adjudications cited above, we cannot doubt the existence of such a power, nor the fact that it was intentionally conferred by the lawmaker. The act in question owes its birth to an attempt by one of the states of this Union to nullify the action of the congress of the United States over subjects that had been committed to its charge by the federal constitution, and the power thereby conferred on federal courts and federal judges was granted for no other purpose than to prevent interference with the rightful authority of the general government. Owing to the dual nature of our government, it was deemed necessary legislation to accomplish that object.

It follows from what has been said that no error was committed by the trial court in receiving the proof which was offered by the petitioner to show that, in point of fact, he was in custody for acts done in the legitimate discharge of his duties as a federal official, nor in ordering his discharge when fully satisfied that such was the case. For acts of that nature the state court was without power to imprison or fine the petitioner, and its judgment inflicting such punishment was void in the same sense that the judgment of a court is void when it sentences a person to a kind of punishment not authorized by law. Ex parte Lange, 18 Wall. 163; Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781.

It is further suggested in the brief of the attorney general, and some stress was laid on that point in argument, that, in any event, the petitioner should not have been discharged on habeas corpus, but

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should have been remanded to the custody of the sheriff, and required to prosecute a writ of error to the supreme court of the United States. This contention, we think, is without merit. While it is true that the relief prayed for by the petitioner could have been obtained in the usual way by a writ of error, yet, in our judgment, the case at bar does not belong to the class of cases in which a person in custody under the warrant of a state court should be compelled to seek relief by appeal or writ of error rather than by a writ of habeas corpus. In the case of Ex parte Royall, 117 U. S. 241, 251, 6 Sup. Ct. 734, it was said, in substance, that when a federal officer is in custody for an act done in pursuance of a law of the United States, or an order, process, or decree of a federal court, and that when a citizen of a foreign state is in custody, under the warrant of a state court, for an act done under an authority claimed to have been conferred by the sovereignty of which he is a citizen, so that our relations with foreign governments are involved in the controversy, such cases present questions of such importance and urgency that the court which is appealed to for relief may and should discharge the petitioner in a proceeding by habeas corpus, instead of compelling him to resort to the slower remedy by appeal, provided that it finds upon an investigation of the case that the petitioner's complaint is well founded. The arrest of federal officers or other persons for acts lawfully done in discharge of their duties under federal laws impairs to a certain extent the authority and efficiency of the general government; and for that reason no court, so far as we are aware, has ever hesitated in that class of cases to discharge a petitioner from custody by writ of habeas corpus, when it appeared on a hearing of the case that the petitioner was entitled to be released from imprisonment.

No other questions besides those already noticed and decided are presented by the assignment of errors which require consideration at our hands. In the brief of counsel for the appellant it is said, in substance, that the errors complained of consisted in overruling the demurrer to the petitioner's plea; that, on the conceded facts of the case, which we take to mean the facts alleged in the petitioner's plea, inasmuch as there is no special finding of fact contained in the record, the trial court had no jurisdiction to issue a writ of habeas corpus or to discharge the prisoner; and that the court also erred in holding that the petitioner was illegally deprived of his liberty when it appeared that he was in custody under the judgment and sentence of the district court of Howard county, Iowa, upon an indictment alleging an offense under the laws of the state. These, in our opinion, are the only questions presented by the record which are open for review by this court; and, as they have each been considered and the position taken by the appellant adjudged to be untenable, the order discharging the petitioner from custody is hereby affirmed.

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(88 Fed. 111.)

McKENZIE v. POORMAN SILVER MINES OF COLORADO, Limited.

(Circuit Court of Appeals, Eighth Circuit. June 20, 1898.)

No, 1,053.

1. CODE PLEADING—DENIALS OF ANSWER.
Under the Colorado Code, the plea of the general issue, as known at common law, is abolished, and the answer must contain a denial of each material allegation intended to be denied, and every material allegation not controverted is taken as true.

2. ACCOUNT STATED.
A mere allegation that, on a certain date, plaintiff "rendered to defendant a statement of said account" (being the account sued on), is not equivalent to an averment that the account between the parties had been stated, showing a specific sum due, so as to make the suit one on an account stated.

3. CORPORATIONS—CONTRACTS OF AGENTS—RATIFICATION.
In an action against a corporation on a contract made between plaintiff and a third person, who is alleged to have acted in behalf of the corporation, it is not necessary to show that the contract was made under authority of a resolution of the board of directors; and, if there is evidence tending to show that it was made in the interest of the corporation, which recognized it, accepted its benefits, and acted on its provisions, this is sufficient to warrant the submission of the cause to the jury.

In Error to the Circuit Court of the United States for the District of Colorado.

Willard Teller (H. M. Orahood and E. B. Morgan, on the brief), for plaintiff in error.

Hugh Butler, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. This action was brought by plaintiff for the purpose of recovering from the defendant, a corporation created under the laws of Great Britain, the sum of $14,005.35, it being averred in the petition that the defendant on the 24th day of October, 1894, was indebted to plaintiff for services by him rendered to defendant as superintendent of its mines and property in Boulder county, Colo., and for money expended, and goods, wares, and merchandise furnished, by plaintiff to defendant, in superintending and prosecuting the work and operations of the defendant; that on the day above named plaintiff rendered to defendant a statement of the account, and defendant thereupon acknowledged said indebtedness, and then and there promised plaintiff to pay the same, but has failed and neglected to pay the same or any part thereof. To this petition an answer was filed, wherein the defendant denied:

"That on the 24th day of October, 1894, or at any other time, it was indebted to the plaintiff in the sum of $14,005.35, or in any other sum, for services by the plaintiff theretofore or at any time rendered to the defendant, or for money expended, or for goods, wares, and merchandise furnished, by plaintiff in superintending and prosecuting the work and operations of the defendant, or for any other consideration, or at all; and it denied that on said 24th day of October, 1894, or at any other time, it acknowledged that it was

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indebted to the plaintiff in the sum of $14,005.35, or in any other sum whatever, or that said sum, or any sum whatever, was due from defendant to plaintiff; and it further denied that it promised to pay to the plaintiff the said sum, or any sum whatever."

When the case was called for trial, and after the jury had been sworn, the plaintiff moved the court for an instruction to the jury to return a verdict in accordance with the prayer of the complaint, on the ground "that the denial of the wording of the indebtedness of the complaint is not a denial under the authorities decided by the supreme court." This motion was overruled by the court, and the case proceeded to a hearing upon the evidence, the plaintiff in the first instance introducing evidence tending to show that he had been in the employ of the defendant company as superintendent of the mines operated by the defendant company, and had expended certain sums of money and furnished goods and wares in connection therewith, and that on or about the 24th day of October, 1894, he and Thomas W. Goad, who, it is claimed, was acting as the general manager of the defendant company, went over plaintiff's account, and agreed upon the sum of $14,005.35 as being the amount due, a statement thereof being made and furnished to Mr. Goad, who said he would forward it to the company in Scotland.

Upon the conclusion of the evidence, the court instructed the jury to find for the defendant, and plaintiff now brings the case before this court by writ of error, and the first ground assigned as error is the action of the trial court in overruling plaintiff's motion for verdict and judgment on the pleadings. The position taken by plaintiff is that the action is on an account stated, and that the answer presented no issue, because it did not deny the averment of the petition that the plaintiff on the 24th day of October, 1894, rendered to defendant a statement of said account, and that, in the absence of a denial of this averment, all the other denials of the answer are of no avail. It is admitted by counsel for plaintiff that the Code of Colorado has abrogated the plea of the general issue as known in the common law, and requires either a general or specific denial of the averments of the complaint. At the common law, in an action upon an account stated, the plea would be "non assumpsit," the foundation of the action being the promise, express or implied, to pay the amount shown to be due by the account stated. This denial is found in the answer of the defendant in this case, and, in substance, the denials of the answer amount to the general issue, which would have been available under the common-law system of pleading. But, as the code system of pleading obtains in Colorado, the answer is to be viewed in the light of the code provisions, which are to the effect that the answer must contain a denial of each material allegation intended to be denied, and that every material allegation not controverted by the answer shall be taken as true; and the contention of the plaintiff is that, as the answer did not deny the averment in the complaint "that plaintiff on said last-named day [October 24, 1894] rendered to defendant a statement of said account," this averment must be taken to be true, and therefore plaintiff was entitled to judgment on the pleadings.

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If the averment in the complaint had been to the effect that on the 24th of October, 1894, an account between the parties had been stated, showing a specific sum to be due plaintiff, it might be that a failure to deny such statement would be construed to be an admission of the cause of action, but that is not the averment in this case. The mere rendition of an account from one party to another does not constitute an account stated, upon which an action can be maintained.

Thus, in Toland v. Sprague, 12 Pet. 300, a case cited by counsel for plaintiff, it is said:

"We agree with the court that the mere rendering an account does not make it a stated one; but that if the other party receives the account, admits the correctness of the items, claims the balance, or offers to pay it, as it may be for or against him, then it becomes a stated account."

The admission of the account rendered, so as to make it an account stated, may be inferred from retaining the same for a sufficient or reasonable length of time without objecting thereto, but such retention is merely the evidence from which the admission is inferred; and therefore when, as in this case, it is averred in a complaint that an account was rendered, and that it was acknowledged by the defendant, who promised to pay it, the case would not be made out by proving that an account had been rendered. It would be necessary, in addition, to prove that the defendant had either expressly promised to pay the amount, or, by receiving the account and retaining it without objection, had impliedly admitted its correctness, from which admission the promise to pay would be implied.

In this case the answer, while admitting that the account had been rendered, expressly denied that the defendant had ever acknowledged it to be correct, or had ever promised to pay it, and thus an issue of fact was created, putting plaintiff to his proof, and the court did not err in overruling the motion for judgment on the pleadings.

The next question for determination is whether the court below erred in directing a verdict for the defendant upon the evidence in the case. As already stated, the plaintiff is seeking to recover for services alleged to have been rendered to defendant as superintendent of the mining property, and also for money expended and goods and wares furnished to the defendant in carrying on the operations of the mine from 1891 to 1894. From the evidence it appears that the mine was originally owned by plaintiff; that on the 1st day of September, 1891, a written agreement was entered into between the plaintiff and H. A. W. Tabor, which recites that a contract had before that date been entered into between the parties with regard to the sale of the Poor Man Lode Mining Claim, in Boulder county, Colo.; that in pursuance of that contract a corporation had been formed under the laws of Great Britain, named the "Poorman Silver Mines of Colorado, Limited," with a capital stock of 130,000 shares, of £1 each, of which 103,000 were ordinary, and 27,000 were deferred, shares; that 10,000 of the ordinary shares had been sold for $48,500, which amount had been paid to plaintiff in part payment of the purchase price of the property; that 4,000 shares of the deferred stock were to be issued to the promoters of the company in payment for

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their services, the remaining 23,000 deferred shares were to be held to procure a working capital for the company, and the remaining 93,000 shares of common stock were to be issued to plaintiff, and, upon the delivery of the deed of the mining property to the corporation, the 93,000 shares of stock issued to plaintiff were to be deposited in the Denver National Bank, Colo., or with its correspondent, the Alliance Bank of London, subject to the order of H. A. W. Tabor, who had the right to withdraw the same from time to time, upon paying into the bank to the credit of plaintiff 80 per cent. of the par value of the stock, and upon the completion of the payment of $330,000, the agreed purchase price, to the plaintiff, the remaining stock should be delivered to the said Tabor; it being further agreed "that the said party of the first part, until he shall be paid in full for his said property, as above herein provided for, shall remain as superintendent, in charge and control of the mine, at a salary of three hundred dollars per month, and that T. W. Goad shall be the resident and consulting engineer of said company."

The evidence does not clearly show the relation actually existing between Tabor and the defendant corporation, but it would appear, from the recitals of this contract, that the corporation was organized for the purpose of completing the contract of purchase of the mine existing between plaintiff and Tabor, and by its terms this contract of September 1, 1891, provided for the purchase of the property by the defendant company, and there is evidence tending to show that the defendant corporation took the benefit of the contract. The contract recites that the property has been conveyed to the company by good and sufficient deeds, which by the further terms of the contract were to be delivered to the Denver National Bank or the Alliance Bank of London, to be held until payment of the purchase price had been completed. It is true this contract is signed only by plaintiff and by Tabor, but, if from the entire evidence it should be found that the defendant company accepted its benefits and acted under its provisions, there would be ground for holding that the company had assumed its obligations, which question would be for the jury under the evidence in the case. This contract expressly provides that the plaintiff, until full payment for the property has been made, should remain in charge and control of the mine, as superintendent, at a salary of $300 per month. The trial judge deemed this to be an absurd and foolish agreement, and held that, before it could be made binding upon the defendant, it ought to be made to appear that it was made by resolution of the board of directors, through and by the constituted authorities, and that it did not appear that Tabor had authority to make such a bargain on behalf of the company. The question is not whether this particular provision of the contract was or was not a wise or foolish provision. It is part of the contract, as plainly stated as it is possible to put it, and it forms part of the consideration for which the plaintiff agreed to sell the mining property to the defendant company. The question to be decided is whether the company is bound by the terms of the contract. The plaintiff testified that this contract of September 1, 1891, was the contract under which the defendant bought the mine; and there was

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certainly, therefore, some evidence to show that this written contract was made in the interest of the company; and, if the company recognized it, accepted its benefits, and acted on its provisions, this would be evidence showing that it was adopted by the company; and, if in fact it was thus recognized and adopted, it became binding upon the company, the same as though it had been formally executed in the corporate name.

It must be further remembered that the suit is not only to recover the sum claimed to be due the plaintiff, as salary for the time he remained in charge of the mine, but also for money expended by plaintiff in paying expenses incurred in running the mine; and there is evidence tending to show that T. W. Goad directed plaintiff to operate the mine, after the defendant company had become interested therein, and that money was expended in putting in machinery, in clearing the mine of water, and in paying the wages of the men employed, and that ore of the value of $70,000 was mined and sold; and there is evidence tending to show that the defendant company received a portion of this money, and to some extent, at least, accepted the benefits of the work done and expenditures made by plaintiff, but the court refused to submit the issue on this branch of the case to the jury. It is not to be denied that upon the questions of the relation of H. A. W. Tabor to the defendant company, of the connection of the company with the contract of purchase of the mining property, of the authority actually possessed and exercised on behalf of the defendant company by T. W. Goad, who in some form and to some extent represented the corporation, the evidence, as presented by this record, is confused and very far from satisfactory, and yet we are of the opinion that it contains some evidence tending to show that the corporation had become bound by the contract of September 1, 1891; that T. W. Goad did to some extent represent and act for the company in managing the affairs of the company in connection with the mining property; that, under the joint management of the plaintiff and T. W. Goad, the mine was operated, expenses incurred, and ore mined of the value of $70,000, which to a greater or less extent went to the benefit of the defendant company; and therefore there was evidence which should have been submitted to the jury, in order that it might be determined, as matters of fact, whether the company had recognized the contract of September 1, 1891, and by accepting its benefits had become bound by its obligations; whether the acts and contracts of T. W. Goad bound the company, either by reason of previous authority granted him, or by approval of his acts in its behalf; and whether the company, by accepting the benefits of the work done and expenditures made by plaintiff in operating the mine, had become bound to repay the cost thereof.

If there was evidence on these matters for the consideration of the jury, as we hold there was, the court below erred in directing a verdict for the defendant, and its judgment must be reversed, and the case be remanded to the circuit court, with instructions to grant a new trial.

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(88 Fed. 116.)

BALTIMORE & O. R. CO. v. HELLENTHAL.

(Circuit Court of Appeals, Sixth Circuit. July 5, 1898.)

No. 578.

1. EVIDENCE—ADMISSIBILITY.
   Testimony of a witness, acquainted with the situation, that a railroad track is straight at a certain point, and a crossing in plain view for a certain distance, is competent.
2. APPEAL AND ERROR—OBJECTIONS TO EVIDENCE.
   Objections to the admission of evidence which do not specifically and distinctly indicate the grounds upon which they are made are of no avail on appeal.
3. CONTRIBUTORY NEGLIGENCE—RIGHT OF ACTION.
   Contributory negligence of the party injured will not defeat an action, if the defendant might, with reasonable care, have avoided the consequences of such negligence.
4. NEGLIGENCE—QUESTION FOR JURY.
   Where there is conflicting evidence as to the distance at which an engineer on a locomotive saw a child on the track and as to the distance within which the train could be stopped, the question as to whether the engineer was negligent in not stopping the train in time is for the jury.
5. MEASURE OF DAMAGES—INSTRUCTIONS.
   When the law in regard to the measure of damages for the killing of a child is correctly given in the general charge, it is not error to refuse a more detailed special instruction covering the same ground.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

This action was brought in the court of common pleas of Franklin county, Ohio, against the Baltimore & Ohio Railroad Company, the plaintiff in error, to recover damages for the death of William Bauer, caused, as alleged, by the negligence of plaintiff in error. The case was, upon petition of the defendant, removed into the circuit court of the United States for the Eastern division of the Southern district of Ohio, and the trial resulted in a verdict and judgment in favor of the plaintiff for $1,500, and the case is brought here for review on writ of error. Deceased was a child 18 months of age, and had escaped from the home of his parents about 9 o'clock a. m., Sunday, April 9, 1894, and had wandered unobserved upon the railroad track of the defendant at a public crossing 50 yards or more from the house, and was sitting with his head down at the edge of the boards which made the highway, and just at the end of the cattle guard, when struck and killed by the locomotive of a passenger train of the defendant going south. This crossing was half a mile or more south of Briggsdale station, on the Midland Division of the defendant's railway system. The view of this crossing was open and unobstructed, and the track straight, from Briggsdale station going south. From Briggsdale station to the crossing is slightly up grade. The day was clear and the track dry. The engineer on the locomotive says the child, when first seen, was thought to be a Plymouth Rock chicken, being dressed, as the proof all shows, in light blue clothes. He says that when he first discovered that the object was a child he was 300 to 400 feet away, and said to the fireman, "My God, Dick, there is a child on the track!" and at once applied the emergency brake, and used all means to stop the train, reversing, as he thinks, the engine. The fireman (Johnson) agrees in the main with the engineer in his testimony, and says positively the engine was reversed, but says that when the engineer told him there was a child on the track they were two, and it may have been three, hundred yards from the child, so far as he can remember. Locomotive engineers were examined as experts, and gave opinions as to the distance required within which to stop a passenger train by

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application of all available appliances under the circumstances attending the accident,—such as the rate of speed, length of train, grade and condition of track. The necessary distance, as estimated by the different witnesses, varied from 350 to 1,000 feet. The court, in the charge to the jury, eliminated from the case and withdrew from the jury every question except the simple issue of fact whether, after the engineer knew or suspected that the object on the track was a child, he used ordinary care and skill to avoid the accident. The exact language of the court was as follows: "This case presents a very simple issue. The first one is whether the engineer, after he saw the object on the track, and after he knew or suspected that that object was a child, used the care and skill which an engineer of ordinary care and skill would have used to avoid the accident. If he did, then the company is not liable; if he did not, the company is liable. The only evidence on the subject shows that the child was sitting at the edge of the boards which make the highway, with its head down over the rail. It was not using the highway for the purpose of passing or repassing. It was sitting there in a way in which it had no right to use the highway. Therefore it had not the rights of a traveler upon the highway, and the company was not bound, with respect to it, to use care before its agents should have discovered that it was a child upon the highway. The only issue before you, therefore, is whether, after the engineer or fireman saw the object, and either knew or suspected that it was a child, he used the care and skill which an average engineer—an engineer of average skill and care—would have used to prevent the accident. If he did, the company is not liable; if he did not, the company is." The court denied a motion or request to direct a verdict in favor of defendant upon the whole of the evidence, refused certain special instructions requested by defendant, and error is assigned to the action of the court in denying the motion and special instructions, as well as to the ruling in admitting certain evidence over objection by defendant.

J. N. Collins, for plaintiff in error.

Thomas B. Minehan, for defendant in error.

Before LURTON, Circuit Judge, and SEVERENS and CLARK, District Judges.

CLARK, District Judge, after stating the case as above, delivered the opinion of the court.

In considering the grounds relied on for reversal in this court, we shall examine the questions in the order in which they would arise in the progress of the trial, rather than according to importance or the order in which they were discussed at the bar. This brings us to the question made on the admission of certain evidence against exception by the defendant. William Bauer, the father of the deceased child, was permitted to testify that the track was straight, and the track and crossing in plain view for about two miles going south, or going from Columbus. There was objection to this at the trial, and also in the assignment of errors, although this is apparently not pressed or relied on in the brief, and the objection is clearly not well taken. It was obviously competent to show by any witness acquainted with the situation that the track was straight, and the view of the crossing unobstructed, and for what distance. Other witnesses had proved substantially the same facts without objection, except the distance was stated as not being quite so far in which the view was thus plain and open. Other evidence was admitted under exception, which presents a more serious question. Experiments had been made by witnesses after the accident and before the trial, by placing objects on the

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railroad track at the crossing where the child was, or was supposed to have been, and walking back upon the railroad track to ascertain by observation how far these objects could be seen. A black hat at one time, and a blue dress on a small bush at another, were the objects used for these tests or experiments. The bush was supposed to represent the height of the child, and the dress the color of that on the child when killed. Not only the full substance of the evidence to the admission of which the error is alleged is in accordance with the rules of this court quoted in the assignment of errors, but the same, with the objection, is set out literally as follows: "Q. What object did you place there? (To which question the defendant objected. Objection overruled. Exception by defendant.)" And the answer thereto as follows: "A. We laid a black hat on the crossing, and went down below the station, and we could see it, and tell what it was." Also the following question asked the witness William Bauer, and the answers thereto: "Q. Did you try more than one object? You used a black hat. Did you try anything else? A. We used a dress there one morning,—one of his little blue dresses. Q. Was it the dress the child had on that morning? A. Another one just like it. Q. How far could you see that dress? A. About three-quarters of a mile. Q. Did you have any difficulty in telling what it was? A. We could tell it was a dress, and the color of it. (To which evidence with reference to the experiments the defendant objected. Objection overruled. Exception by defendant.)" Also the following question, asked the witness Anton Hellenthal: "Q. What did they place on the track to look at? (To which question the defendant objected. Objection overruled. Exception by defendant.) A. It was on the public road crossing. Q. What did you place on the track, to go and look at, to see how far you could see it?" And the answer thereto, as follows: "A. We had a dress just like the child had on. Q. How far could you see that dress? A. Why, we could see it—let me see—over half a mile. (To which question and answer the defendant objected. Objection overruled. Exception by defendant.)" Also the following question asked the witness Solomon S. Moore: "Q. Well, what did you observe about that?" And the answer thereto, as follows: "A. We took a bush,—a small bush,—and put it on the crossing, put a little garment on it, and then went back to the curve. (To which question and answer the defendant objected. Objection overruled. Exception by defendant.)" It will be seen that these objections are general, and no specific grounds for the objections are stated. The learned circuit judge, in the charge, explained to the jury fully and clearly that this evidence was admitted for the sole purpose of enabling the jury to weigh the credibility of the engineer's statement that he did not suspect the presence of the child until too near to avoid the accident. The jury was told that, if the circumstances of these experiments were not sufficiently similar to those of an engineer in the cab above the track, and going at a rate of speed of 40 or 45 miles an hour, then they should be disregarded as evidence. The contention is that the question whether the conditions in the experiments were substantially or sufficiently similar

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to those of the engineer was one going to the admissibility, and not to the effect, of the evidence, and was, therefore, a preliminary question for the court, and not the jury. We do not find it necessary, however, to decide this question. We have remarked that the objection to the testimony was general. It has been decided again and again that an objection to evidence which does not specifically and distinctly indicate the grounds upon which it is made is of no avail on writ of error. Mitchell v. Marker, 22 U. S. App. 325, 10 C. C. A. 306, and 62 Fed. 139; Toplitz v. Hedden, 146 U. S. 252, 13 Sup. Ct. 70; U. S. v. Shapleigh, 12 U. S. App. 26, 4 C. C. A. 237, and 54 Fed. 126. This assignment, for this reason, cannot be sustained.

The question raised by the assignment of error on the court's action in refusing to direct a verdict for defendant must now be examined. The contention is that the deceased child, being a trespasser on the railroad track, and so treated in the court's instructions to the jury, it would be necessary for plaintiff, in order to recover, to show that the killing was willful or intentional, while this element of willful injury is neither alleged nor proved. It must be conceded that the case proceeded throughout upon the theory of negligence only, and not of willful wrong; and it is undoubtedly the well-established general rule that with respect to trespassers upon its track the railroad company owes no duty except to do such trespassers no intentional wrong or injury. As was said by this court in Felton v. Aubrey, 43 U. S. App. 291, 20 C. C. A. 441, and 74 Fed. 356:

"The law imposes no duty in respect to trespassers upon its track, except that general duty which every one owes to every other person to do him no intentional wrong or injury. The liability of a railway company to discharge this duty can only arise when it becomes aware of the danger in which a trespasser stands. Railroad Co. v. Cook, 31 U. S. App. 277, 13 C. C. A. 364, and 66 Fed. 115. The overwhelming weight of authority is in accord with this rule, and no court has more clearly stated the principle than the supreme court of Kentucky. McDermott v. Railroad Co., 93 Ky. 408, 20 S. W. 380; Hoskins v. Railroad Co., 30 S. W. 643; Brown's Adm'r v. Railroad Co., 97 Ky. 228, 30 S. W. 639; Gherkins v. Railroad Co., 30 S. W. 651."

There is, however, a qualification of this general rule as thus stated, as fully established by decisions of the highest authority as the rule itself. This qualification is expressed in the proposition that, if it be shown that the defendant might, after becoming aware of plaintiff's negligence, by the exercise of reasonable care and prudence have avoided the effect of the plaintiff's negligence or trespass, the defendant is liable for the injury. The qualification of the rule is thus stated in Railway Co. v. Ives, 144 U. S. 429, 12 Sup. Ct. 687:

"Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, subject to this qualification, which has grown up in recent years (having been first enunciated in Davies v. Mann, 10 Mees. & W. 546): that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence."

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Among numerous decisions, both state and federal, supporting this qualification of the general rule, we refer to the following: Patton v. Railway Co., 89 Tenn. 370, 15 S. W. 919; Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653; Railroad Co. v. Harmon's Adm'r, 147 U. S. 582, 13 Sup. Ct. 557; Railway Co. v. Whitcomb, 31 U. S. App. 386, 14 C. C. A. 183, and 66 Fed. 915; Railroad Co. v. Kassen, 49 Ohio St. 230, 31 N. E. 282; Louisville & N. R. Co. v. East Tennessee, V. & G. Ry. Co., 22 U. S. App. 102, 9 C. C. A. 314, and 60 Fed. 993. Indeed, the principle of this qualification is now the accepted doctrine in the English courts, including the house of lords, and in all the courts of all the states of the Union, so far as the cases presenting the question squarely have come under our examination. See 7 Am. & Eng. Enc. Law (2d Ed.) p. 387; 1 Shear. & R. Neg. (5th Ed.) § 99.

In view of what has been said, it is hardly necessary to add that the principle of this qualification is based upon the ground of negligence only, and the element of intentional or willful wrong is not essential to render the principle applicable. That this is true is a proposition so clearly deducible from the cases referred to as to admit of no question or discussion. We think this well-established qualification of the general rule was applicable to the facts of this case. There was a conflict in the evidence, as we have seen, as to the distance in which a passenger train, under the circumstances of the one in question, might be stopped, and there was a similar conflict as to the distance at which the engineer first became aware that the object ahead was a child. In view of the extreme limits of the distance in both respects, which appear in the evidence, we are of opinion that the court could not say, as a matter of law, that the jury might not justifiably conclude upon the whole of the proof that the engineer might, by the exercise of reasonable care and skill, have avoided the injury. We think the court properly submitted that question to the jury upon the disputed facts of the case, and that there was no error in the court's refusal to withdraw the case from the jury. White v. Van Horn, 159 U. S. 3, 15 Sup. Ct. 1027; Railroad Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491.

The only remaining assignments of error relied on in argument are based upon the court's refusal to give certain special charges in relation to the measure of damages. The court's instruction to the jury upon this subject was as follows:

"Now, what do I mean by pecuniary loss? I mean that you are to estimate, as far as you may, what, had the child lived, would those who sue here, its parents and next of kin, receive in money from that child and its earnings. Therefore you are to estimate—First, how long it would have been likely to live; second, if it had lived, what would have been its earning capacity; third, assuming that it would have earned money, how much of that money would have come to the relatives. And in that connection you ought to consider the fact that for a number of years, until it was 14 years of age, there was no probability that it would earn anything, and there was every probability that it would be a burden upon the parents."

In this instruction the jury's attention was correctly called to the proper elements of damage, and the purpose of the special instructions seems to have been to have the court apply the principles

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for the injury in a somewhat mathematical way, by stating an account between the probable income from service of the child and the expense of education and maintenance. The principles under which damages were to be assessed were correctly and explicitly given, and the details of estimating the damages were within the province of the jury. The special instructions were not different in substance or effect from the court's charge upon the same subject, which was not excepted to, nor subject to legal objection. The only difference was in mode of statement and the extent to which details were given. The law having been correctly stated in the general instruction, the court was not required to repeat the same statement in substance in a special instruction. White v. Van Horn, 159 U. S. 3, 15 Sup. Ct. 1027; Coffin v. U. S., 162 U. S. 664, 16 Sup. Ct. 943; Railroad Co. v. Leak, 163 U. S. 280, 16 Sup. Ct. 1020.

Two other objections are made in the assignments of error, but these are not discussed in the brief for plaintiff in error, and apparently not relied on. In view of the record, we think they are clearly not well taken, and do not require special consideration. Judgment affirmed.

(88 Fed. 122.)

TUTTLE v. CLAFLIN.

In re LEE et al.

(Circuit Court of Appeals, Second Circuit. June 24, 1898.)

No. 119.

1. APPEAL—RECORD—MOTION TO STRIKE OUT.
   Where several different proceedings are pending below, arising in the same original suit, and an appeal is taken from a decree rendered in one of them, matters embodied in the record which relate only to the other proceedings will be stricken out on motion.

2. SAME—PARTIES.
   An appeal cannot be dismissed on the ground that the appellants are not parties, where, though they are not parties to the record in technical form, they were made parties by an order of the court below, so as to be entitled to appeal from the decree.

3. SAME—APPEALABLE FINAL DECREE.
   A decree entered in a proceeding by attorneys to enforce a lien for their fees, which adjudges that they are entitled to compensation to a definite amount and have a lien therefor on a fund in court, and directs payment thereof, is a final appealable decree, although the residue of the fund may not have been finally disposed of.

4. ATTORNEY AND CLIENT—LIEN FOR COMPENSATION—AUTHORITY TO RETAIN.
   Where an assignee for benefit of creditors, who was engaged in prosecuting a suit for infringement of a patent belonging to the estate, contracted with a third person, who was suing the same party for infringement on another patent, to unite their interests for their mutual benefit, and authorized such third person to carry on or settle the litigation at his own expense, and divide the net amount recovered equally between them, *held*, that the latter had authority to employ a solicitor and counsel, who should be entitled to a lien for their fees on the fund recovered by their efforts. 86 Fed. 964, affirmed.

5. ATTORNEYS AND CLIENT—CONTRACT FOR COMPENSATION.
   After entry of a decree in a trial court for merely nominal damages, counsel for complainant entered into a contract with him whereby counsel

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agreed to prosecute an appeal, and use all reasonable efforts to secure a reversal, complainant agreeing to pay all necessary disbursements, and to give counsel 20 per cent. of the gross amount of any recovery which should be paid, after deducting the expenses and disbursements. A reversal of the decree was thereafter obtained with directions for a substantial recovery, and thereupon the opposite party moved the court for a modification of the proposed mandate, which motion was successfully opposed by complainant's counsel. Application was then made to the supreme court for a writ of certiorari, which motion was also successfully opposed by plaintiff's counsel. *Held*, that the contract for compensation covered, not merely the services rendered in procuring the reversal, but also the subsequent services rendered in both courts.

Appeal from the Circuit Court of the United States for the Southern District of New York.

After the final decree had been entered in the cause of Tuttle, Trustee, against Claflin, for the payment of $43,557.27 to the complainant, and before April 16, 1897, the Union Trust Company of New Haven, Conn., and other creditors of the estate of the Elm City Company, brought a bill in equity in the circuit court for the Southern district of New York to restrain George H. Wooster, who, under three contracts with Tuttle, trustee, was authorized to collect the judgment, and Mr. Milliken, his solicitor, from collecting it, upon the ground that these contracts were void; and praying, among other things, that the fund, when collected, should be transmitted to the probate court in New Haven, and, in the alternative, that a master should be appointed by the circuit court to ascertain the amount of the sums, which should be immediately payable to Wooster, Milliken, and Lee & Lee, who were made defendants. A motion for a temporary injunction restraining Wooster and Milliken from collecting the judgment was made returnable on April 16, 1897, at which time the circuit court preferred that the judgment should be paid into court, and deposited in the designated depository, than that it should remain unpaid during the pendency of this new litigation, and ordered that the defendants place in the depository of the court, on or before April 19, 1897, the amount of the judgment, which was done, and it was satisfied of record. The motion for preliminary injunction was withdrawn. On June 14, 1887, Benjamin F. Lee and W. H. L. Lee, partners as Lee & Lee, brought their petition in the matter of this fund, averring the facts in regard to their employment in the original suit; their services in the various proceedings and hearings before the circuit court, the master, the circuit court of appeals, and the supreme court; that they have a lien upon the deposited fund for the payment of their reasonable fees, which the complainant in the original suit was unable to pay; and averring the existence of the Union Trust Company litigation, the progress of which had become uncertain by the interposition of demurrers, and praying for an order directing payment of their fees, and a reference to a master to ascertain the amount which was due. In the Union Trust Co. Case an amended bill was filed on April 26, 1897, and additional parties were made. Upon an order upon the parties in Tuttle against Claflin and the parties in the Union Trust Company suit to show cause, an order was made, on September 1, 1897, referring to a master to report in regard to the compensation of Lee & Lee, and W. T. B. Milliken, the solicitor for the complainant in the Claflin Case. The report was made, exceptions were filed and were overruled, the report was confirmed by the circuit court (86 Fed. 972), and an order, dated April 6, 1898, was made directing a payment from said fund of $11,434.90 to Lee & Lee, and $3,500 to W. T. B. Milliken, with interest from February 11, 1898, the date of the master's report. The Union Trust Company and others, known as the opposing creditors, appealed from this order.

Edmund Wetmore and John K. Beach, for appellants.
W. H. L. Lee and H. T. Kingsbury, for Lee & Lee.
W. T. B. Milliken, pro se.

Before WALLACE and SHIPMAN, Circuit Judges.

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SHIPMAN, Circuit Judge. Two preliminary motions by the appellees are to be disposed of prior to a consideration of the merits of the appeal. Since the entry of final judgment in the Claflin suit, there have been three independent proceedings at the foot of the decree: (1) The present proceedings at the suit of Lee & Lee. (2) A proceeding upon the petition of George H. Wooster for the repayment of his disbursements in the litigation. (3) A motion to substitute Charles H. Trowbridge, as trustee of the Elm City Company, in the place of Tuttle, as complainant in the Claflin suit. This motion was denied.

There are in the transcript of record, from printed pages 174 to 178, inclusive, copies of a stipulation and of two orders of court, and the opinion of the court relative to the second and third proceedings only. The present motion is to strike from the record that part of it which is included in these pages, because they relate to different proceedings from the one in which this appeal is taken. The position of the appellees is well founded, the papers are not properly a part of the transcript of record, and the motion is granted, except as to the order upon the application of George H. Wooster.

The second motion is to dismiss the appeal because the order was not appealable, and because the appellants are not parties to this cause or proceeding. The history of the application of the appellees, which has been heretofore given, shows that, while they are not parties in technical form, they were in fact made parties by the order of the circuit court, and are properly appellants. That the order of the circuit court of April 6, 1898, was a final decree from which an appeal could be taken, was decided in Trustees v. Greenough, 105 U. S. 527. The order, like those in that case, was "a final determination of the particular matter arising upon the complainant's petition for allowance." The motion is denied.

It appears from the master's report that the patent in the Claflin Case was owned by the Elm City Company, an insolvent corporation, which made, in 1876, an assignment of its assets to Tuttle, as trustee for its creditors. The suit was commenced on August 1, 1878. In June, 1883, Tuttle, as trustee, and George H. Wooster, who was the owner of patents known as the "Pipo Patents," and upon which he had also a suit against H. B. Claflin & Co., agreed that each would push, at his own expense, the suits to a final determination, and divide the gross proceeds equally. In 1888 another agreement between the same parties was made, by which Tuttle, as trustee, made Wooster his attorney to prosecute the suits, with full power to settle and compromise them and to employ counsel. In the same year another agreement was made, by which Wooster agreed to hold Tuttle, as trustee, harmless from all costs and expenses arising out of said suits, but Wooster was to be reimbursed out of the gross proceeds, and before the division thereof, his expenses and those which he might become liable to pay. The poverty of the Elm City Company's estate induced Tuttle to make these agreements. In 1890, Wooster retained B. F. Lee, Esq., and he had also retained W. T. B. Milliken, Esq. Mr. Lee was the active patent lawyer in the case. Wooster paid the expenses incidental to the suit, amounting, as he

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says, to $5,438.31. Tuttle paid nothing and took no part in the litigation, except to tell Milliken that he had no funds and no collectible assets, and that Milliken must look for his compensation alone to the funds which might be recovered.

The appellants insist that the contracts made by Tuttle as trustee were improvident and ultra vires, and that the entire fund should be sent to the probate court at New Haven, which has charge of the settlement of the estate of the Elm City Company, and which should make the proper allowances, if any, for services. Inasmuch as Wooster was fully clothed with the apparent power to employ counsel, as the trustee took no part in the litigation, paid and proposed to pay nothing, and relieved the estate from all liability in case of nonsuccess, and as the fund was obtained by the disbursements of Wooster and the services of those whom he employed, they have an equitable lien upon it, and the circuit court, which properly has control of the fund, should adjust the amount of the liens for these services before transmitting it to another jurisdiction. Trustees v. Greenough, 105 U. S. 527; Railroad Co. v. Pettus, 113 U. S. 116, 5 Sup. Ct. 387.

The master made a careful report, which considered the value of the services of Messrs. Lee & Lee, based upon a quantum meruit, and found that they were reasonably worth the sum of $13,000, from which should be deducted $1,850, a sum already paid by Wooster, leaving a balance due of $11,150, to which should be added $284.90 for disbursements which they made. The contest before the master was between Lee & Lee and the opposing creditors, so called. After the payment of $1,850 had been made, and after a decree in the Claflin Case for six cents damages and such an apportionment of costs that a balance would be in favor of the defendants, and after an appeal had been taken, B. F. Lee and Wooster entered into an agreement, dated December 29, 1894. The important part of the agreement, after a recital of the condition of the suit, is as follows: Lee agreed to act as counsel for Wooster in the prosecution of said appeal, and to use all reasonable and proper efforts to secure a reversal of said final decree. Wooster agreed to pay all disbursements connected with said suit and with said appeal that had already been made or incurred, or that might thereafter be incurred, other than fees of solicitor and of counsel, and agreed that Lee should receive 20 per cent. of the gross amount of any recovery which should be paid in said suit, after deducting from said total recovery and payment all expenses and disbursements of litigating said suit theretofore, or which might thereafter be expended or incurred, apart from such 20 per cent.

The value of the whole services, estimated upon a quantum meruit, would probably exceed the 20 per cent. mentioned in this contract. The proper construction of the contract is therefore an important question. Was it confined in point of time to the date of the opinion of the first appellate court, or did it include all services before that court, and exclude any possible services before the supreme court? After the decision of the court of appeals, the defendants made a motion to modify the proposed order for a mandate so that the case should be sent back to the master for further evidence. This

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motion was based upon affidavits which were intended to show that a different state of facts could be proved before the master. Another motion was made upon the ground that Tuttle, as trustee, had no title to the patent in suit. After the denial of these motions, the defendants applied to the supreme court for a writ of certiorari, which was opposed by a brief and an oral statement, and was denied, so that a large amount of work was performed after the opinion of the court of appeals was filed.

We think that this contract should not be construed as limited in point of time to that date, or to a mandate which might forthwith follow the opinion, but it included whatever contests and arguments should take place in the appellate court. It was to be expected that some motion would be made by the defendant in case of nonsuccess, and the contract looked to a compensation based upon a permanent reversal of the decree of the circuit court, for the new agreement would have been an inadequate benefit to Wooster if a new compensation upon the basis of a quantum meruit was to commence after a successful argument in the court of appeals. We think that the contract meant to include services necessary to render a reversal valuable and remunerative, and to cover those rendered in opposing a writ of certiorari. Mr. Lee entered into a contract for services for a compensation based upon the successful attempt to reverse the decree, which meant to keep it reversed, so as to secure a fund out of which he could be paid, and a defense against the application for a writ of certiorari is one of the not unusual incidents to success in the first appellate court. The compensation to Lee & Lee must, therefore, be governed by the contract, and should be estimated as follows: The amount of interest paid by the depositary, being at the rate of 1½ per cent. per annum, is to be added to the amount of the judgment, from which should be deducted Wooster's claim of $5,438.31, and Lee & Lee's disbursements of $284.90, and the amount of 20 per cent. upon the balance, plus $284.90, with interest from February 11, 1898, the date of the master's report, upon the amount of the fund not heretofore paid to Lee & Lee, should be ordered paid by the clerk of the court to them. If a payment has been made from the fund to Lee & Lee under the order of April 6, 1898, such amount will be regarded as part payment of the sum named in the decree. We do not include Milliken's solicitor's fees in the disbursements to be deducted from the judgment, because the contract provided that these fees were not to be paid by Wooster, and the expenses which were to be thereafter deducted were those which he had paid or was thereafter to pay.

In regard to Mr. Milliken's fees of $3,500, there was no testimony before the master which characterized this sum as an unreasonable amount. The master has found it to be reasonable, and, without testimony or further knowledge upon the subject, we cannot pronounce it excessive. The order in regard to his fees is affirmed.

The order in regard to the amount to be paid Lee & Lee is modified as hereinbefore specified, and the cause is remitted to the circuit court, with directions to enter a modified decree in accordance with the directions contained in this opinion. The appellants and the

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appellees will each pay their own costs in this court. The appellants will pay one-half the cost of printing the record, and Lee & Lee and Milliken will each pay one-quarter of said cost.

(88 Fed. 130.)

SANDS v. E. S. GREELEY & CO.

(Circuit Court of Appeals, Second Circuit. June 24, 1898.)

No. 120.

FOREIGN RECEIVERS—COMITY—RIGHTS OF LOCAL AND FOREIGN CREDITORS.

When a foreign receiver is obliged to invoke the aid of the court of another state in asserting his title to assets within its jurisdiction, such court will not, in the exercise of comity, recognize his title to the prejudice of the citizens of its own state, who have fairly acquired title to the assets, either by purchase, attachment, or other legal process, or whose claims are entitled to priority as equitable liens. But the court will make no distinction between foreign and domestic creditors when their claims are of equal validity, and it rests in the court's discretion whether the assets within its jurisdiction shall be distributed under its own direction or shall be transmitted to the primary receiver.

Appeal from the Circuit Court of the United States for the Southern District of New York.

F. G. Dow, for receiver.
H. B. Twombly, for appellant.
E. C. Perkins, for appellee.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. E. S. Greeley & Co., a corporation organized under the laws of the state of Connecticut, became insolvent, and on the 6th day of October, 1896, receivers of all its property and assets were appointed by the decree of one of the courts of that state, with authority to collect and possess themselves of all the property of the corporation and all the usual powers of receivers of insolvent corporations. The corporation had a place of business in the city of New York, transacted its principal business there, and substantially all of its assets consisted of property there. Upon a bill filed in the circuit court of the United States for the Southern district of New York, alleging the insolvency of the corporation, the existence of assets within the jurisdiction of the court, and the appointment of receivers by the Connecticut court, and praying that receivers be appointed of such assets, ancillary to the Connecticut receivers, the circuit court of the United States for the Southern district of New York by its decree appointed as ancillary receivers the same persons who had been appointed by the Connecticut court, and enjoined all persons from interfering with the assets, for the collection of debts or otherwise. By an interlocutory order in the cause, the ancillary receivers were directed to advertise for claims of the resident creditors of the corporation, and, after collecting the assets, to dispose of them as the court should instruct; and the question of the dis-

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posal of any surplus remaining after payment of all resident creditors was reserved by the court. Various resident creditors proved claims against the corporation for debts contracted by it at the city of New York, among them the New York Insulated Wire Company. The New York Insulated Wire Company has appealed from an order made in the cause, transferring the fund in the hands of the ancillary receivers to the Connecticut receivers, and adjudging that such fund should not be appropriated to the resident creditors before turning over the surplus to the Connecticut receivers.

The appeal is based upon the contention that the Connecticut receivers have no title or power to collect the assets of the corporation outside of that state, and that in the state of New York the assets are primarily subject to the claims of its citizens, and will not be surrendered until they are satisfied. There are expressions in the text-books which sanction this contention. Thus, it is stated in Beach on Receivers (section 254) that "a foreign receiver will not be permitted, as against the claims of creditors resident in another state, to remove from that state the assets of the debtor, it being the policy of every sovereignty to retain in its own hands the property of the debtor until the claims of its citizens have been satisfied."

Similar expressions may be found in some of the opinions of the courts, but an examination of the adjudications will show that the broad proposition has never been ruled, and what has been actually decided is that, when a foreign receiver is obliged to invoke the aid of the court of another state in asserting his title to assets within its jurisdiction, such court will not, in the exercise of comity, recognize his title to the prejudice of the citizens of its own state, who have fairly acquired title to the assets, either by purchase, attachment, or other legal process, or whose claims are entitled to priority as equitable liens. Patterson v. Lynde, 112 Ill. 207; Hoyt v. Thompson's Ex'r, 19 N. Y. 207; Willitts v. Waite, 25 N. Y. 577; In re Waite, 99 N. Y. 433, 12 N. E. 440; Kidder v. Tufts, 48 N. H. 121; Paine v. Lester, 44 Conn. 196; Fawcett v. Supreme Council, 29 Atl. 614; Eddy v. Winchester, 60 N. H. 63; Askew v. Bank, 83 Mo. 366; Pinckney v. Lanaham, 62 Md. 447; Insurance Co. v. Wright, 55 Vt. 526; Baldwin v. Hosmer (Mich.) 59 N. W. 432; Hunt v. Insurance Co., 55 Me. 290; Taylor v. Insurance Co., 96 Mass. 353; Bagby v. Railroad, 86 Pa. St. 291.

A receiver appointed in one state for an insolvent corporation has no title as such to property located in another state, and not actually in his possession. Whart. Confl. Laws, § 390. This is because he is appointed by a court which derives its jurisdiction from state laws which have ex proprio vigore no extraterritorial force, and the effect of which in other states depends wholly on the comity of the state in which their application is invoked. But by the comity extended by the several states of the Union to one another, not only from motives of respect but from considerations of mutual convenience, the right of a receiver to possess himself of assets located in a state other than that of his appointment is everywhere recognized and enforced, subject to the qualification mentioned. When property in another state has actually been reduced to his possession, he

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can stand upon his possessory title, and defend his rights against all others who cannot prove a better title. It is only when he is compelled to resort to the courts to obtain possession of assets that he must rely upon that principle of comity upon which alone his title rests.

When the administration extends over assets located in several jurisdictions, it is often convenient to apply, in advance, for the assistance of the different courts; hence the practice has become common of applying for auxiliary or ancillary appointments. When such an application is made, the court to which it is addressed exercises its own original jurisdiction. The decree in the court of the domicile of the corporation is evidence in every other state that the corporation is insolvent, and that a proper case exists in that state for the appointment of a receiver, and it is to be respected accordingly, in obedience to the constitutional provision whereby full faith and credit is to be given in each state to the records and judicial proceedings of every other state of the Union. But it is for the court to which the application is made to decide what remedy it should extend in the particular case, and whether the proper administration of the assets requires the appointment of a receiver. Ordinarily, in comity to the proceeding of another court of co-ordinate jurisdiction, it will appoint an ancillary receiver, and assume administration in aid of the primary receiver. Trust Co. v. Miller, 33 N. J. Eq. 155. When it appoints a receiver, the officer becomes its officer, and is completely amenable to its control, and it matters not whether he is called an ancillary receiver or merely a receiver. His title to the assets within the jurisdiction is derived from its decree, and does not depend upon comity. The assets are in its custody, and are to be disposed of as equity and the orderly administration of justice require. Its judgments and decrees in respect to these assets must be accepted as conclusive by all other courts. "Where a receiver, administrator, or other custodian of an estate is appointed by the courts of one state, the courts of that state reserve to themselves full and exclusive jurisdiction over the assets of the estate, within the limits of the state." Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773. It rests in the discretion of the court appointing the receiver whether the assets within its jurisdiction shall be distributed under its own direction or shall be transmitted to the primary receiver. U. S. v. Coxe, 18 How. 105. It is eminently proper that claimants residing within its jurisdiction should be relieved from the expense and inconvenience of proving their claims in other jurisdictions, and that provision should be made for securing to them equality of distribution in respect to the whole assets of the corporation; but there is no hard and fast rule to control the discretion of the court in making such distribution of the assets as shall be just to all creditors, and ultimately effect a ratable distribution of all the property of the corporation. Buswell v. Supreme Sitting (Mass.) 36 N. E. 1065; Baldwin v. Hosmer (Mich.) 59 N. W. 432.

Courts of justice make no distinction between foreign and domestic creditors when their claims are of equal validity. After the appointment of the ancillary receivers, all the creditors of the insolvent cor-

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poration who had not acquired some priority of lien upon its assets were upon an equal footing. None had previously acquired any, and, under the remedies given by the laws of the state, the domestic creditors could not have secured priority upon the assets in that state over the foreign creditors. Bank v. Lacombe, 84 N. Y. 367.

The orders which have been appealed from were a proper exercise of judicial discretion. If they had directed the appropriation of the fund to satisfy the debts of resident creditors, excluding foreign creditors except as to the surplus, the rule that equality among creditors is equity would have been ignored.

The orders are affirmed.

(88 Fed. 140.)

UNITED STATES TRUST CO. v. MERCANTILE TRUST CO. et al.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1898.)

No. 379.

1. EQUITY—CONCLUSIVENESS OF MASTER'S FINDINGS.

Where, by stipulation and order of court based thereon, the cause is referred to a special master to take the proofs "and report the same to the court, with his findings of fact and conclusions of law thereon," the master's findings of fact are conclusive upon the court, so far as they are based on conflicting evidence, or the veracity of witnesses, or so far as there is evidence consistent with the finding. But this rule is confined strictly to findings of fact and does not include the interpretation and legal effect of documents, nor is it applicable when, by subsequent stipulation, additional evidence is introduced before the court.

2. RAILROADS—CONTRACT OF SALE AND LEASE.

One railroad company, by written contract, agreed to sell to another, and the latter agreed to buy, part of its road at a fixed price, but the contract recited that, owing to mortgages on the property, the vendor could not then make a clear title; and it was therefore further agreed that in the meantime it should lease the road to the purchaser at a fixed rental per mile. The provisions in relation to the sale and to the lease were kept distinct throughout the instrument, and a right was reserved to the lessor to reenter for nonpayment of rent, etc. *Held*, that, prior to the time when title could be transferred, the relations of the parties were those of lessor and lessee, and that, even if the contract of sale was ultra vires the lease was valid.

3. SAME—LIABILITY OF LESSEE FOR TAXES.

A railroad company leased part of its road to another company, the lessee agreeing to pay all taxes assessed against the leased property. Under the local laws taxes on the leased line were assessed to the lessor, as owner, in the same manner as the taxes upon the part of its road not leased; and in the course of business the lessor paid all the taxes and then rendered bills to the lessee for the proportion due from the leased line. The assessment of all the property of the lessor, including the leased line, having been raised, it contested the same, and after long litigation the assessment was sustained. In the meantime receivers had been appointed for the lessee company, and they had remained in possession of the leased road, and had raised money to pay other taxes thereon by issuing receivers' certificates. *Held*, that their action was an adoption of the lease, and they were liable, according to its terms, to repay to the lessor their proper proportion of the judgment for the contested taxes.

4. RAILROAD RECEIVERS—ADOPTION OF LEASE—PRIORITY OF CLAIMS—TAXES.

Where one of the conditions on which receivers are appointed in railroad foreclosure proceedings is that they shall pay all claims for taxes, and

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the receivers adopt the provisions of a lease by continuing in the possession and operation of the leased line, a claim for taxes which the lessor company has been compelled to pay, and which, by the terms of the lease, the lessee is bound to refund, becomes entitled to priority over the mortgage debt.

5. JUDGMENT—COLLATERAL ATTACK—EVIDENCE.

In a suit by a lessor railroad company to recover, under the provisions of the lease, taxes on the leased property which the lessor has been compelled to pay by the judgment of a court of competent jurisdiction, evidence as to the assessable value of the leased line is inadmissible as being, in effect, a collateral attack upon the assessment and upon the judgment in favor of the state for the amount of the taxes.

6. RAILROAD LEASE—CONTEST OF TAXES BY LESSOR—ATTORNEY'S FEES AND COSTS.

Where a lessee railroad company is bound by the provisions of the lease to repay to the lessor taxes paid by it on the leased property, and, upon the subsequent increase of the assessment of the leased line, together with other roads of the lessor, the lessee, through its counsel, assents to a contest thereof by the lessor, which contest results in favor of the state, the lessee company, and its receiver subsequently appointed, are liable for their due proportion of the attorney's fees, costs, and interest incurred in the contest.

80 Fed. 18, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of California.

This case comes up on an appeal by the United States Trust Company, one of the defendants in the court below, from an order of the circuit court for the Southern district of California, made and entered April 7, 1897, upon the petition in intervention of the Southern Pacific Railroad Company. The order appealed from directed the receiver of the Atlantic & Pacific Railroad Company, one of the defendants to the bill brought by the Mercantile Trust Company for the foreclosure of the latter's mortgage upon the properties of the Atlantic & Pacific Railroad Company, to pay to the intervener, the Southern Pacific Railroad Company, the sum of $48,683.74, the same being the aggregate amount of the proportion of taxes claimed to be due from the Atlantic & Pacific Railroad Company to the Southern Pacific Railroad Company for the fiscal year 1887–1888, together with a certain proportion for attorney's fees, costs of suit, interest, etc., incurred by the Southern Pacific Railroad Company in contesting and litigating the taxes for the fiscal year 1887–1888. The suit in which the intervention was filed was brought by the Mercantile Trust Company, one of the appellees on this appeal, against the Atlantic & Pacific Railroad Company, to foreclose its mortgage against the properties of that company, executed on September 1, 1887, and known as the second mortgage. Subsequently, on June 14, 1895, an amended and supplemental bill was filed by the complainant, making the United States Trust Company, the present appellant, holder of the first mortgage against the Atlantic & Pacific Railroad Company, a party defendant. Thereafter, on October 7, 1896, the Southern Pacific Railroad Company filed its petition in intervention, asking that the receiver appointed by the court below be directed, by the order of the court, to pay to the petitioner the gross sum of $48,683.74, claimed to be due for taxes and a portion

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of the expenses incurred by the intervener in litigating the taxes for the fiscal year 1887–1888, under an agreement existing between the two companies, and dated August 20, 1884. It appears that the receiver himself had previously, on August 25, 1896, filed a petition, stating that the Southern Pacific Railroad Company had made such a demand upon him, and asking for the advice and order of the court as to whether or not he should pay the same. Answers to these petitions were filed by both the United States Trust Company, the present appellant, and the Mercantile Trust Company, one of the appellees. The matter was referred, by the agreement of the parties, to a special master, "to take the proofs of the respective parties, and report the same to the court, with his findings of fact and conclusions of law thereon." On December 11, 1896, the special master duly made his report with his findings of fact and conclusions of law thereon, the effect of which was that he denied and rejected the claim for taxes, etc. Exceptions to some of these findings of fact and to all of the conclusions of law were thereupon filed by the intervener, the Southern Pacific Railroad Company. These came on for hearing before the court below, which sustained all of the exceptions, and made and entered on April 7, 1897, its order and decree, directing the payment of the claim in the full amount of $48,683.74 and costs. See opinion of the court below, 80 Fed. 18. It is from this order and decree that the present appeal is prosecuted by the United States Trust Company, holder of the first mortgage upon the Atlantic & Pacific Railroad Company. The facts of the case bearing more or less directly on the only question at issue, viz. whether or not the claim for taxes, etc., should be paid by the receiver as against the prior mortgage liens, may best be stated in the clear and concise statement of them contained in the opinion of the court below, as follows:

On the 20th day of August, 1884, a contract was made and entered into in writing by and between the Southern Pacific Railroad Company, a corporation organized under and in pursuance of the laws of the state of California, as party of the first part, the Atlantic & Pacific Railroad Company, a corporation created and organized under the acts of the congress of the United States, as party of the second part, the St. Louis & San Francisco Railway Company, a corporation organized under the laws of the state of Missouri, as party of the third part, and the Atchison, Topeka & Santa Fé Railroad Company, a corporation organized pursuant to the laws of the territory and state of Kansas, as party of the fourth part, which recited that whereas, the party of the first part to the contract was then the owner of a certain line of railway in the state of California, particularly described therein; and whereas, it had then been agreed by and between the parties to the contract that such line of railway should be sold by the party of the first part thereto, and purchased by the party of the second part, upon the terms and conditions therein stated; and whereas, in consequence of the lien then existing upon such line of railway under the mortgage made and executed by the party of the first part, bearing date April 1, 1875, the party of the first part could not then make clear title to such line of railway, it had then been agreed that until clear title thereto could be made, such line of railway should be leased by the party of the first part to the party of the second part upon certain terms and conditions therein stated; and whereas, the parties of the third and fourth parts were then largely interested pecuniarily in the acquisition of such line of railway by the party of the second part "by lease and purchase as aforesaid,"—the

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respective parties did thereupon, in consideration of the premises and the mutual undertakings and agreements in the contract stated, and for other good and valuable considerations therein acknowledged, covenant and agree to and with each other as follows:

First. The party of the first part agreed to sell to the party of the second part, and the party of the second part agreed to purchase from the party of the first part, the said line of railway, described as extending from the west end of the bridge over the Colorado river at or near The Needles, in the state of California, 242.37 miles, or thereabouts, to the easterly margin of the grounds or yards of the party of the first part used in connection with the Mojave Junction station, or with the main line of railroad of the party of the first part between Goshen and Yuma, together with the right of way therefor 200 feet in width, and the switches, sidings, turnouts, station buildings, section houses, turntables, and other appurtenances, together with the right to connect at Mojave Junction with the tracks of the party of the first part, but excluding the equipment of the road, and any interference with the right of way and depot grounds of the party of the first part at the junction mentioned, at and for the price of thirty thousand dollars a mile (that is to say, seven million two hundred and seventy-one thousand one hundred dollars), of which purchase price one-sixth part (that is to say, one million two hundred and eleven thousand eight hundred and fifty dollars) to be paid in cash, and the remaining six million and fifty-nine thousand two hundred and fifty dollars to be paid by the party of the second part to the party of the first part either in cash or in first mortgage six per cent. bonds of the party of the second part issued under and secured by its first mortgage, bearing date July 1, 1880, the prompt payment of the principal and interest of which to be legally guaranteed by the parties of the third and fourth parts to the contract, respectively; it being expressly agreed that the sale should be consummated and the purchase price of the line of railway paid whenever the party of the first part should be able to make clear title thereto, discharged from the lien of its first mortgage bearing date April 1, 1875, and from all other liens existing thereon at the time of the contract, or which may be imposed thereon by the party of the first part at any time thereafter.

Second. The contract declared that in the meantime, and until the consummation of such sale and payment of the purchase price of the property, the party of the first part agreed to and did lease and demise to the party of the second part, and the party of the second part agreed to and did hire from the party of the first part, from the 1st day of October, 1884, the said line of railway, together with the appurtenances, in the contract agreed to be sold at and for the annual rental of eighteen hundred dollars per mile,—that is to say, four hundred and thirty-six thousand two hundred and sixty-six dollars, payable semiannually during the continuance of such lease; and the party of the second part covenanted and agreed to and with the party of the first part, for itself and its successors and assigns, to pay to the party of the first part, its successors and assigns, as rental for the line of railway and appurtenances mentioned, until the consummation of the sale and the payment of the purchase price, as provided for, the sum of two hundred and eighteen thousand one hundred and thirty-three dollars on the 1st days of April and October in each and every year; and further, for itself and on behalf of its successors and assigns, to further promptly pay and discharge all taxes and assessments which should thereafter become due upon said property, or any part of it, or which might become in any wise due or owing in respect to the same, and would maintain, repair, and replace such property so that the same should at all times be and remain in substantially as good plight and condition as it then was, the nature and character of the property being considered.

Third. The contract further provided that in case default should be made in the payment of any installment of such rental at the time stipulated for its payment, and such default should continue for thirty days, the party of the first part, its successors and assigns, might thereupon and without demand or other formality enter upon and take possession of the said line of railway, with its said appurtenances, and should be thereafter entitled to hold, retain,

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and enjoy the same as of its original estate therein; but, notwithstanding such entry, the party of the second part, its successors and assigns, for any and all damage in any wise resulting from the nonfulfillment of the contract, or any wrongful acts or omissions of the party of the second part, its successors or assigns, in respect to the said property, or any part thereof. The contract contained the further provision that, in case of the happening of any such default in respect to the payment of the rental provided for, and the continuance of such default for thirty days, then, and in that event, at the election of the party of the first part, its successors or assigns, the right of the party of the second part to purchase the premises under the provisions of the contract should cease and determine.

Fourth. The party of the third part and the party of the fourth part to the contract, for themselves and their respective successors and assigns, in consideration of their pecuniary interest in the stock and securities of the party of the second part, and their interest in the opening and maintenance of a through line of freight and passenger traffic over their respective lines of railway and over the line of railway then belonging to the party of the first part (the subject of the contract), and for other good and valuable considerations in the contract acknowledged, guarantied to the party of the first part, its successors and assigns, the prompt payment to the party of the first part, its successors and assigns, of the several installments of rental, and of the purchase price therein agreed to be paid by the party of the second part to the party of the first part, and that, in case default should be made by the party of the second part in the payment of such installments or rent, or of any, or of any part, thereof, or in the payment of such purchase price at the time or times stipulated for the payment thereof, the parties of the third and fourth parts, for themselves and their respective successors and assigns, would promptly pay to the party of the first part, upon demand, any and all amounts in respect of which the party of the second part should make such default, which amounts so paid by the party of the third or fourth part should be justly chargeable by the party paying the same against all amounts then due or which might become due from it to the party of the second part for traffic over such leased lines, or any line of the party of the second part, and should be otherwise enforceable as a debt of the party of the second part to the party of the third or fourth part who should have paid the same; it being understood and agreed, however, that the parties of the third and fourth parts should not be liable in solido for such amounts, but that each of such parties should be liable only for the one-half part of the several installments of rent and the purchase price thus guarantied by it.

The contract in question contained other provisions, not important to be specially mentioned. Under and by virtue of this contract the Atlantic & Pacific Railroad Company, on the 1st day of October, 1884, took actual possession of the line of railroad therein described, and its appurtenances, excepting only the equipment thereof, and continued in the actual and exclusive possession, use, and control thereof until the appointment by this court of receivers of the property, since which time the receivers have, respectively, been in such actual and exclusive possession, use, and control. While the Atlantic & Pacific Railroad Company was in possession, use, and control of the line of railroad and its appurtenances extending from The Needles to Mojave, under and by virtue of the aforesaid contract of August 20, 1884, to wit, on the 1st day of September, 1887, it executed a mortgage covering, among other property, its right, title, and interest thereto and therein, to the Mercantile Trust Company of New York, to secure the payment of certain bonds. The Atlantic & Pacific Railroad Company had previously, to wit, on the 1st day of July, 1880, executed to the Union Trust Company of New York a mortgage to secure the payment of certain other bonds, which mortgage was broad enough to cover, and whose terms did cover, the after-acquired interest of the mortgagor in the line of railroad and its appurtenances constituting the subject-matter of the contract here in question. By virtue of its mortgage, and because the Atlantic & Pacific Railroad Company had made such default in its terms and conditions as entitled it to do so, the Mercantile Trust Company, on the 8th day of January, 1894, commenced suit in this court for the

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foreclosure of its mortgage and to obtain the appointment of a receiver or receivers of all of the property covered thereby during its pendency. That mortgage covering the entire line of road of the Atlantic & Pacific Company, the principal portion of which is situated in the territories of New Mexico and Arizona, the mortgagee had previously commenced similar suits in the United States courts for those territories, in each of which suits three receivers of the property of the mortgagor there situated were appointed. Of the portion of the mortgaged property situated within this judicial district, this court, in the suit here brought by the Mercantile Trust Company, appointed the same receivers who had been appointed by the court of primary jurisdiction. Those receivers at once qualified, and took possession of such of the line of road as extended from The Needles to Mojave, with its appurtenances. Subsequently, to wit, on June 14, 1895, the Mercantile Trust Company filed an amended and supplemental bill in its suit in this court, in which the United States Trust Company of New York was made a party defendant, as the holder of the first mortgage on the said line of road extending from The Needles to Mojave, with its appurtenances. To that amended and supplemental bill the United States Trust Company appeared by counsel. Later in the proceedings in the suit, one of the original receivers having deceased, and the remaining two having tendered their resignation, this court, following the similar action of the court of primary jurisdiction, accepted their resignations, to take effect upon the appointment and qualification of a successor or successors. Thereupon this court, still following the similar action of the court of primary jurisdiction, appointed C. W. Smith receiver of the property situated within this judicial district, who qualified as such and received from the former receivers herein the possession of said property, since which time he has been, and now is, in its actual and exclusive possession, use, and control. On the 25th day of August, 1896, the receiver, Mr. Smith, filed in and presented to this court his petition, setting forth the contract of August 20, 1884, made and entered into between the Southern Pacific Railroad Company, the Atlantic & Pacific Railroad Company, the St. Louis & San Francisco Railway Company, and the Atchison, Topeka & Santa Fé Railroad Company, and the continuous and exclusive possession, under that contract, of the line of road extending from The Needles to Mojave, with its appurtenances, by the Atlantic & Pacific Railroad Company and the receivers of its property ever since; and further alleging that the receivers so appointed have not disavowed that contract, but, on the contrary, during the receivership, have expressly acknowledged and admitted its terms and conditions, so far as the receivership is concerned. The petition of the receiver further states: That the receivers have at all times promptly paid to the Southern Pacific Railroad Company all taxes paid by it, or claimed to have been paid by it, upon the line of railroad described in the contract of August 20, 1884, including not only taxes assessed and levied for the years in which the receivers have been in possession of that line of road, but also for taxes which were levied and reassessed against the Southern Pacific Railroad Company for the years 1885, 1886, and 1887. That the state board of equalization of the state of California, in August, 1887, for the purposes of state and county taxation for the fiscal year ending June 30, 1888, assessed the Southern Pacific Railroad Company, as the owner and operator of a line of railroad running in more than one county in said state, consisting of 1,022.33 miles in the state of California, together with the franchises, roadway, roadbed, rails, and rolling stock, at the sum of $16,500 per mile, and that included in that assessment and valuation was the line of railroad described in said contract of August 20, 1884. That thereafter, and in due time, the state board of equalization of California apportioned of said total assessment of the franchises, roadway, roadbed, rails, and rolling stock of the defendant to the county of Kern the amount of $2,476,945 of said total assessment of the railroad therein of 153.47 miles, and to the county of San Bernardino the sum of $4,220,022 for the railroad therein of 261.47 miles. That at that time, of the line of road described in said contract of August 20, 1884, there was situated 35.64 miles in Kern county, California, and 206.87 miles in the county of San Bernardino, which constituted a part of the said 1,022.33 miles. That

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from the time of the execution of the said contract of August 20, 1884, to the present time the line of road described in that contract, because of the revenue laws of the state of California, has been assessed by the state board of equalization of the state of California to the Southern Pacific Railroad Company, which has, whenever it saw fit to do so, paid the taxes due upon the line of road described in said contract of August 20, 1884, and made bills therefor against the Atlantic & Pacific Railroad Company and the receivers thereof. That neither the receivers nor the Atlantic & Pacific Railroad Company have ever attempted to pay the taxes thereon, but have always waited until the Southern Pacific Railroad Company should pay the same, for the reason that in each county there were additional taxes against the balance of the lines of railroad belonging to the Southern Pacific Railroad Company, and therefore there was no way of paying the amount due upon the portion of road extending from Mojave to The Needles without paying the entire amount due from the Southern Pacific Railroad Company in each county. That when the taxes became due which were levied and assessed upon said lines of railroad of the Southern Pacific Railroad Company for the year 1888 [1887], the Southern Pacific Railroad Company failed to pay the same, and that said taxes became delinquent on the last Monday of December, 1887, at six o'clock p. m. That the total amount of taxes levied for the fiscal year ending June 30, 1888, against the Southern Pacific Railroad Company for its railroad in the county of Kern was $34,479.07, and that upon the failure to pay the same there was added to it by the comptroller of the state the sum of $1,723.95 as penalty. That there was levied for the same year, in the county of San Bernardino, upon said assessment upon the total lines of railroad belonging to the Southern Pacific Railroad Company the sum of $30,468.56, and that there was added to said amount as a penalty, upon its becoming delinquent, the sum of $1,523.42. That on the 2d day of January, 1891, the state of California caused an action to be brought in the superior court of the state of California in and for the city and county of San Francisco against the Southern Pacific Railroad Company to recover the entire amount of taxes which had been levied in the various counties upon the lines of railway owned and operated by it, including the line of railroad mentioned and described in the written contract of August 20, 1884, and seeking to recover the total sum of $251,134.26, with 5 per cent. penalty thereon, which included the sums so levied in Kern and San Bernardino counties, as aforesaid; and that afterwards, to wit, February 3, 1893, a judgment was duly rendered in the action for the total sum of $251,134.26, together with interest thereon from the 27th day of December, 1887, at the rate of 7 per cent. per annum, amounting to $89,654.91, together with 5 per cent. penalty upon said principal sum, amounting to $12,556.66, and the further sum of $18,835.06 for attorneys' fees, and $42.16 costs against the Southern Pacific Railroad Company. That thereafter an appeal was duly taken from that judgment to the supreme court of California, which court affirmed the judgment (38 Pac. 912) except as to the amount allowed for interest, namely, the sum of $89,654.91, and as to the sum of $6,278.31 allowed as attorney's fees to one A. R. Cotton. That afterwards the Southern Pacific Railroad Company appealed from that judgment to the supreme court of the United States, pending which appeal the operation of the judgment was stayed. That pending the appeal to the supreme court of the United States, and in 1894, the state board of equalization, under an act of the legislature of the state of California approved March 23, 1893, made a reassessment of the taxes due from the Southern Pacific Railroad Company on its system of railroads for the year ending June 30, 1888, and taxes having been duly levied thereon upon that reassessment, the Southern Pacific Railroad Company, in the fall of 1894, paid the first half of the taxes upon such reassessment, and made a bill to the receivers of the Atlantic & Pacific Railroad Company for their proportion, amounting to the sum of $14,902.86, which bill the receivers paid in due time. That thereafter, and in the spring of 1896, the supreme court of the United States affirmed the judgment so appealed from (16 Sup. Ct. 794), after which the Southern Pacific Railroad Company paid the amount thereof, and on the 8th day of June, 1896, made and presented

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to the present petitioner, as receiver, a bill for the proportion of the taxes which it claimed to be due from the receiver under the contract entered into between the Southern Pacific Railroad Company, the Atlantic & Pacific Railroad Company, the St. Louis & San Francisco Railway Company, and the Atchison, Topeka & Sante Fé Railroad Company. That included in the bill so made is the sum of $5,981.87, as the portion of attorneys' fees collected by the state of California, which the Southern Pacific Railroad Company claims that the receiver should pay, and that there is also added to said bill the sum of $12,580.36 as and for interest on the judgment from the date of its rendition to the date of its payment, at seven per cent. per annum, and being the proportion which the Southern Pacific Railroad Company claims that the receiver should pay. The petition of the receiver further alleges that the action of the Southern Pacific Railroad Company in permitting a penalty to be added to the said tax and in permitting attorneys' fees, costs, and interest to accrue thereon, was without the knowledge or consent of the Atlantic & Pacific Railroad Company or its receivers, in that neither the Atlantic & Pacific Railroad Company nor its receivers had any voice in the matter, nor was that company or its receivers ever consulted about the same. The petition of the receiver further states that the United States Trust Company objects to the payment by the receiver of any part of the bill so presented by the Southern Pacific Railroad Company, and he therefore asks the advice and order of this court as to what he shall do in the premises. The bill presented by the Southern Pacific Railroad Company, concerning which the controversy arises, is as follows:

"San Francisco, Cal., June 8, 1896.

"Atlantic and Pacific R. R. Co. to Southern Pacific Company, Pacific System.

"Amended Bill.

"Charged in
Month of
1896.

June 8. For state and county taxes as paid by Southern Pacific Company under judgment of U. S. supreme court, March, 1896, for the year ending June 30, 1888, on the franchise, roadbed, rails, rolling stock, etc., of the line from Mojave to The Needles.

Valuation returned by the So. Pac. R. R. Co. in 1887			$ 9,570,200
Roadbed, etc	$8,182,900		
Rolling stock	1,387,300, or 14.50 pr. c.		
Original assessment of So. Pac. R. R. Co. in 1887:			
Amount of tax, $25,134.26		$16,139 60 per mile.	
Less 14.50 per cent		2,340 24	
		$13,799 36	
Kern Co., 35.64 miles R. R. at $13,799.36 per mile, $491,809.19, at $2.00 per $100			$ 9,836 18
San Bernardino Co., 206.87 miles R. R. at $13,799.36 per mile $2,854,673.60, at $1.33 per $100			37,967 15
			$47,803 33
Proportion of $47,803.33 to total tax ($251,134.26), 19.03 per cent.			
Add penalty	$12,556 66		
Add attorney fees	18,877 22		
		$31,433 88	
19 per cent. of $31,433.88			5,981 87
			$53,785 20
Interest from date of judgment, Feb. 5/93, to June 8/96, 3 years, 4 mos., 3 days, at 7 per cent. per annum			12,580 36
			$66,365 56

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Amount brought forward		$66,365 56
Less payments by company:		
Bill rendered and paid, 1st Inst. of reassessment, Nov. 22, 1894	$14,902 86	
Interest Nov. 22/94, to June 8/96, 1 year, 6 mos., 16 days, at 7 per cent	1,611 16	
Interest on tender of 2d Inst. of reassessment, Apr. 25/95, to June 8/96, 1 year, 1 mo., 13 days, at 7 per cent	1,167 80	
		17,681 82
		$48,683 74

"I certify the above to be correct. E. B. Ryan.
"Examined. George T. Klink.
"Approved. E. C. W.
"Payment should be made to the treasurer S. P. Co., San Francisco, Cal. If any item is questioned, or explanation is required, address General Auditor, San Francisco, Cal."

The Mercantile Trust Company and the United States Trust Company each filed an answer to the petition of the receiver. By its answer the former objected to the payment of any portion of the penalty or attorney's fees included in the bill in question, and the latter protested against the payment of any portion of the bill on the ground that the tax in question became delinquent and the penalty accrued prior to the appointment of either of the receivers, and that, while the claim may be valid against the Atlantic & Pacific Railroad Company, it is invalid as against its mortgage, and consequently not a proper charge against the receiver. Thereafter the Southern Pacific Railroad Company filed an intervening petition, asking the court to direct the payment of the bill rendered by it, to which the receiver and the United States Trust Company filed answers. The matters at issue were thereupon referred to a special master to take the proofs of the respective parties, and report the same, together with his findings of fact and conclusions of law, to the court. The report of the master was filed December 11, 1896, and to the report the Southern Pacific Railroad Company filed exceptions January 4, 1897. Thereafter the report and the exceptions thereto came on regularly for hearing, at which time the receiver, by leave of the court, amended his petition by so changing the clause therein in relation to the acknowledgment and ratification by the receivers of the contract of August 20, 1884, as to make it read as follows: "And that the receivers have not disavowed said contract; neither have said receivers affirmed said contract in any manner whatever, unless their acts with reference thereto shall in law be deemed to amount to an affirmance thereof."

The first and third findings of the special master are to the effect that the Southern Pacific Railroad Company leased the line of railroad extending from The Needles to Mojave, with its appurtenances, to the Atlantic & Pacific Railroad Company, which company entered into possession thereof under such lease, and continued in such possession until the appointment of the receivers. To these findings the Southern Pacific Railroad Company excepted, on the ground that they are contrary to the terms and legal effect of the written contract of August 20, 1884.

The sixteenth finding is as follows: "The value of the leased property for the purposes of taxation for the year 1887, considered separately from any franchises or rolling stock (and taking into consideration the fact, which I find to be true, that the cost of operating the leased property has for many years prior and subsequent to the appointment of the receivers herein exceeded its earnings), was $4,000 per mile, or a total of $969,480, which is 5.39 per cent. of the entire valuation of the franchises, roadway, roadbed, rails, and rolling stock of the Southern Pacific Railroad Company in California, as fixed by the state board of equalization for that year." To this finding the Southern Pacific Railroad Company excepted on the ground that all of the testimony upon which it is based was erroneously admitted, and was objected and excepted to by the intervener at the time, and upon the ground that the finding

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is unsupported by the evidence as given, and is not a finding of the value of the property for the purpose of taxation for the year 1887, considered separately from any franchises or rolling stock, and, further, is in entire disregard of the contract of August 20, 1884.

The nineteenth finding is as follows: "I find that 5.39 per cent. of $251.-154.26, the amount of the original tax for 1887, without interest or penalties, amounts to the sum of $13,536.13." To this finding the intervener excepted, upon the ground that it is not within the issues presented by the pleadings.

The twenty-second finding is as follows: "I find that the action of the intervener, the Southern Pacific Railroad Company, in refusing to pay the said taxes levied and assessed for the fiscal year of 1887, ending June 30, 1888, and in defending the said suit of the state of California therefor, was wholly voluntary upon its part, and was in no manner induced or caused by any request, consent, or advice upon the part of the defendant the Atlantic & Pacific Railroad Company, represented by W. C. Hazeldine, its general attorney, or other attorney, officer, or agent having authority in the premises, or upon the part of the present or former receivers herein, or of any attorney or representative of such receivers." To this finding the intervener excepted, upon the ground that it is not only unsupported by, but is directly contrary to, the evidence in the case.

The twenty-third finding is as follows: "I find that while the original receivers and the present receiver have continued to operate and use the leased line of road since their respective appointments, the contract of lease dated August 20, 1884, has not been expressly or impliedly affirmed or adopted by them in such manner as to require the present receiver to pay the account of the intervener in question." To this finding the intervener excepted, on the ground that it is in conflict with the petition of the receiver, and with the answer filed thereto by the United States Trust Company of New York, and with the orders theretofore made by the court in the cause, and with the evidence in the case.

Exceptions were also taken by the Southern Pacific Railroad Company to all of the conclusions of law reported by the special master, the first of which is to the effect that the evidence offered and introduced before him, showing the respective amounts of taxes levied and assessed for the years 1883, 1884, 1885, and 1886, and subsequently reassessed and paid by the intervener, was irrelevant and immaterial, and should, together with the findings of fact based thereon, be disregarded. The second is to the effect that, although the amounts shown by the bill rendered by the intervening petitioner to the receiver were not paid until June 6, 1896, yet, inasmuch as such payments were made exclusively on account of taxes due for the fiscal year 1887, ending June 30, 1888, upon the assessment made by the state board of equalization for that year on all of the property of the Southern Pacific Railroad Company, including the Mojave Division, such payments do not, under the orders appointing the receivers, and under the facts shown by the evidence and found, constitute such an equitable claim, charge, or lien, as against the United States Trust Company, upon the property, or the earnings thereof in the hands of the receiver, as to require or justify the payment of the account, or any part thereof by the receiver. The third conclusion of law is to the effect that the evidence introduced by the respective parties before the master in reference to the justice and fairness of the total taxes levied for the year 1887 and other years upon the property of the intervener, which was charged by that company against the Atlantic & Pacific Railroad Company under the contract of August 20, 1884, was irrelevant and immaterial, and should, together with the findings of fact thereon, be disregarded. The fourth and last conclusion of law is to the effect that an order should be made and entered directing the receiver not to pay any part of the bill rendered by the intervening petitioner, the Southern Pacific Railroad Company, and that its petition in that behalf be dismissed.

The findings of the special master to which no exceptions were taken show, among other things, that the receivers originally appointed in this suit took possession of the property described in the contract of August 20, 1884, and continued to operate it as a part of the Atlantic & Pacific Railroad until the

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appointment and qualification of the present receiver, who thereupon took possession of the property, and has ever since continued to operate it as a part of the Atlantic & Pacific Railroad; that the Southern Pacific Railroad Company returned its franchises, roadway, roadbed, rails, and rolling stock situated in the state of California, and subject to taxation by the state board of equalization, at the following valuation for the following years:

(A) For the franchise, roadway, roadbed, and rails, for the year 1885	$ 8,991,350
For the rolling stock	1,383,050
Total	$10,374,400
(B) For the year 1886, for the franchises, roadway, roadbed, and rails	$ 9,991,300
For the rolling stock	1,387,300
Total	$11,378,600
(C) For the year 1887, for the franchises, roadway, roadbed, and rails	$ 8,992,592
For the rolling stock	1,427,350
Total	$10,419,942

That the state board of equalization of the state of California increased the valuation as returned by the Southern Pacific Railroad Company for the years 1885, 1886, and 1887, as follows: "For the year 1885, the value of the franchises, roadway, roadbed, rails, and rolling stock was fixed by the state board of equalization at $17,000,000. For the year 1886 the value of the same property was fixed by the same board at $17,000,000. For the year 1887 the value of the same property was fixed by the same board at $16,500,000." That the valuations so fixed by the state board of equalization of the state of California were so fixed for each year, respectively, as an entirety, and that the state board of equalization did not attempt to assess separately the value of either the franchises, the roadbed, roadway, or rails, or of the rolling stock, and that the evidence fails to show upon what, if any, particular class of property returned by the Southern Pacific Railroad Company for taxation for these years the increase in valuation was made. That the Southern Pacific Railroad Company successfully resisted in the courts the collection of the taxes assessed against it for the years 1885 and 1886 by the state board of equalization of the state of California. That in pursuance of legislation authorizing such action the state board of equalization of the state of California reassessed the property of the Southern Pacific Railroad Company in California for the years 1885 and 1886, and attempted to reassess the same property for the year 1887. That as a result of such reassessment the valuation of the said property as fixed by the state board of equalization for the years 1885 and 1886 was reduced as follows: "For the year 1885, to $9,570,200; for the year 1886, to $9,570,200." That the Southern Pacific Railroad Company paid the taxes so reassessed for the years 1885 and 1886, and the former receivers of the Atlantic & Pacific Railroad Company, appointed by this court January 8, 1894, paid to the Southern Pacific Railroad Company such proportion of said taxes as was demanded by the Southern Pacific Railroad Company, and at the time here stated; that is to say:

March 21, 1894	$15,074 10
June 4, 1894	15,074 10
January 11, 1895	14,870 60
May 13, 1895	14,870 60
Total	$59,889 40

That of the taxes of the Southern Pacific Railroad Company for the year 1885 the amount apportioned to the Atlantic & Pacific Railroad Company as the taxes of the Mojave Division, by the representatives of the Southern Pacific

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Railroad Company, on the basis of the original assessment would have been $52,517, and that interest on that sum at seven per cent. per annum to the date of actual payment would amount to $29,409; making a total amount of $81,296. That the apportionment for the year 1886 on the same basis would have been for taxes, $52,517, and for interest $29,400, making a total of $81,296, or a total for the two years of $162,592,—while, under the reassessment, the total amount paid by the Atlantic & Pacific Railroad Company for the years 1885 and 1886 was $59,889.40. That at the time the taxes for the years 1885 and 1886 were originally assessed, and for many years thereafter the Atlantic & Pacific Railroad Company was a solvent and going concern, while at the time of the reassessment in the years 1893 and 1894 it was insolvent, and in the hands of the receivers. The findings also show that of the amount of taxes, attorney's fees, interest, and penalties originally adjudged to be paid by the superior court of the city and county of San Francisco there was a deduction of interest amounting to $89,654.91, and of counsel fees amounting to $6,278.31, upon a review of that judgment by the supreme court of California, which was affirmed by the supreme court of the United States. That the total value of the franchises, roadway, roadbed, rails, and rolling stock of the Southern Pacific Railroad Company in California for the year 1887, as fixed by the state board of equalization, was $16,500,000. That of the taxes assessed against the Southern Pacific Railroad Company in California for the year 1887 the former receivers paid to the Southern Pacific Railroad Company, on the 11th day of January, 1895, the sum of $14,902.86, which sum was paid within a reasonable time after demand made therefor, and that no subsequent demand for payment of any portion of the remainder of the taxes for 1887, as claimed by the Southern Pacific Railroad Company, was ever made until the presentation of the bill here in question. The special master further found that on the 23d day of May, 1892, the Southern Pacific Railroad Company refunded to the Atlantic & Pacific Railroad Company the sum of $25,924.39 upon a demand by the Atlantic & Pacific Railroad Company, and upon a voucher made by the representatives of the latter company, for excessive taxes theretofore paid by the Atlantic & Pacific Company to the Southern Pacific Railroad Company, as follows:

For the year ending June 30, 1885	$ 1,926 66
For the year ending June 30, 1889	6,871 29
For the year ending June 30, 1890	9,181 17
For the year ending June 30, 1891	7,945 27
Making a total of	$25,924 39

Upon the hearing of the exceptions it was stipulated and agreed by and between counsel for the respective parties that all papers referred to or mentioned in the exceptions should be considered to the same extent and with the same force and effect as if offered upon the hearing before the master, and that, in addition to the papers mentioned in those exceptions, the petition of the United States Trust Company of New York, filed in this court, praying leave of the court to institute suit against the receivers appointed in this cause, with the bill of complaint attached to that petition, and the order of the court made thereon, should be considered with the same effect as if offered in evidence before the master, and that the petition of the receivers of the Atchison, Topeka & Santa Fé Railroad Company to the court originally appointing them, and the order of that court based thereon, asking leave to disaffirm the contract of lease attached to the petition of the receiver herein, and also the petition of the receivers of the St. Louis & San Francisco Railway Company to the court originally appointing them, and the order of that court based thereon, for like leave to disaffirm the said contract, and also the answer and objections of the United States Trust Company of New York to the application of the receivers for leave to borrow money, which answer and objections were filed in this court on the 14th day of May, 1895, should be considered with the same effect as if offered in evidence before the master. It was further stipulated that none of the parties to the present record were parties to the proceedings in which the attempted disaffirmance took place, nor had any notice thereof; the stipulation, however, reserving any and all

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objections to the materiality, relevancy, and admissibility of any of such papers and evidence. 80 Fed. 18–31.

As previously stated, the court below sustained all of the exceptions taken by the Southern Pacific Railroad Company to the findings of fact and the conclusions of law of the special master, and directed the payment of the amount claimed by the intervener as taxes, from which order and decree the present appeal is prosecuted by the United States Trust Company. There are 14 assignments of error.

C. N. Sterry and Neill B. Field, for appellant.

Harvey S. Brown and J. E. Foulds (J. S. Chapman, of counsel), for intervener and appellee Southern Pac. R. Co.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

MORROW, Circuit Judge, after stating the case as above, delivered the following opinion:

The ultimate question presented for determination on this appeal is whether or not the claim of the intervener and appellee, the Southern Pacific Railroad Company, against the Atlantic & Pacific Railroad Company, an insolvent corporation, for a just proportion of the taxes paid by the Southern Pacific Railroad Company for the fiscal year 1887–1888, under its agreement of August 20, 1884, with the Atlantic & Pacific Railroad Company, should be paid by the receiver of the Atlantic & Pacific Railroad Company in preference to the mortgage lien of the United States Trust Company, the appellant. The determination of this question depends upon the consideration of three leading propositions, to wit: (1) Is the Atlantic & Pacific Railroad Company liable to the Southern Pacific Railroad Company, under the conditions of the agreement of August 20, 1884, for its just proportion of taxes for the fiscal year 1887–1888? (2) If so liable, does such a claim for taxes constitute a preferential claim to that of the mortgage lien? (3) If it does, in what amount should such taxes be allowed, and should a just proportion of the sum paid by the Southern Pacific Railroad Company for attorney's fees, costs of suit, interest, etc., incurred in litigating and contesting the taxes for the fiscal year 1887–1888, be also allowed and reimbursed to the latter company by the receiver of the Atlantic & Pacific Railroad Company? Before entering into a consideration of these propositions, there is a preliminary question to be disposed of, and that is as to the effect to be given to the findings of fact of the special master. It is contended, at the outset, by the counsel for the appellant, that this court and the court below are bound by the findings of fact made by the special master. It will be observed that the reference, by the court below, to the special master, of the claim for taxes made by the intervener, the Southern Pacific Railroad Company, was not that of an ordinary reference to take and report testimony, but it was stipulated and agreed between counsel representing all the parties that the special master should "take the proofs of the respective parties, and report the same to the court,

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with his findings of fact and conclusions of law thereon." The effect of this stipulation was undoubtedly to constitute, to a certain extent, the special master as the judge of the facts presented to him. The scope and effect of such a stipulation is tersely stated by Mr. Justice Brown, delivering the opinion of the United States supreme court in Davis v. Schwartz, 155 U. S. 631, 636, 15 Sup. Ct. 237, 239, in the following language:

"As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his findings, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a circuit court in a case tried by the court under Rev. St. § 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but, so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable."—citing Wiscart v. D'Auchy, 3 Dall. 321; Bond v. Brown, 12 How. 254; Graham v. Bayne, 18 How. 60, 62; Norris v. Jackson, 9 Wall. 125; Insurance Co. v. Folsom, 18 Wall. 237, 249; The Abbotsford, 98 U. S. 440.

See, further, Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355; Crawford v. Neal, 144 U. S. 585, 596, 12 Sup. Ct. 759; Furrer v. Ferris, 145 U. S. 132, 12 Sup. Ct. 821.

So far, therefore, as the findings of fact by the special master, under the stipulation referred to, are based upon conflicting evidence, or upon the veracity of witnesses, or so far as there is evidence consistent with the finding, they are conclusive and binding upon the court. But, in so far as other and additional evidence is introduced before the court, the rule is inapplicable. In this case it appears that after the special master had reported, and filed his findings of fact and conclusions of law, it became necessary to introduce further evidence. To obviate a re-reference, the parties entered into a stipulation consenting to the introduction of certain documentary evidence, referred to above in the statement of the case, and stipulated further that none of the parties in this case were parties to the proceedings in which the attempted disaffirmance took place, nor had any notice thereof. The effect of this stipulation and of the introduction of the documentary evidence referred to was to render the rule inapplicable so far as the evidence may be deemed material and relevant to any of the findings of fact by the special master. Furthermore, the rule is confined strictly to questions of fact. It does not include questions of law, nor, generally speaking, the interpretation and construction of the legal effect of documents. In the case at bar the special master interpreted the agreement of August 20, 1884, to be a lease, and made findings of fact to that effect. Upon exceptions taken to these findings, the court below interpreted the agreement as a contract of sale, thereby overruling the special master. It is plain that the findings of fact of the special master as to the legal effect of the instrument in question were no more binding upon the court below than is the interpretation placed by the court below on the same instrument conclusive on this court upon the present appeal. In this view it follows that findings of fact (Nos. 1 and 3) of the special

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master, in which he found that the agreement of August 20, 1884, was a lease, were not binding on the court below, and that that court was correct in exercising its own independent judgment as to the interpretation to be given the agreement. In so doing the learned judge held that the agreement was a contract of sale, and that the lease features of the agreement were merely incidental; but in arriving at this conclusion we think he did not give the lease features of the agreement the importance and prominence they deserve, and which the parties intended. The agreement of August 20, 1884, was of a dual character. It was a contract to sell and a lease. That it was intended to be, and was, an executory contract of sale, is plainly deduced from the language employed, as appears from the terms set forth in the statement of the case. The Southern Pacific Railroad Company agreed to sell to the Atlantic & Pacific Railroad Company, and the latter agreed to buy from the former, the line of railway extending from the west end of the bridge over the Colorado river, at or near The Needles, to the easterly margin of the grounds or yards of the Southern Pacific Railroad Company used in connection with the Mojave Junction station, or with the main line of road of the Southern Pacific Railroad Company between Goshen and Yuma, in the state of California, some 242.32 miles in length. But it affirmatively appears from the agreement itself that the Southern Pacific Railroad Company could not, at that time, owing to the existence of a certain mortgage covering the property in question, transfer a clear title to the road. Nor does the agreement state, in this particular, when it could or would be able to convey a clear title. It therefore simply contracted to transfer a good title when it was able to do so. This part of the agreement is what constitutes it an executory agreement or contract of sale. Then the agreement further specifically provides that meanwhile, and until the consummation of the sale, and payment of the purchase price of the property, the Southern Pacific Railroad Company would lease and demise to the Atlantic & Pacific Railroad Company, from the 1st day of October, 1884, the said line of railway, together with the appurtenances, in the contract agreed to be sold, at and for the annual rental of $1,800 per mile,—that is to say, $436,266,—payable semiannually during the continuance of the lease. For the purposes of the lease, the Atlantic & Pacific Railroad Company was put in full possession of the line of railway. It was further distinctly provided that, in the event of any default by the Atlantic & Pacific Railroad Company in its payment of the rental for the lease as agreed, the Southern Pacific Railroad Company should retake possession. All through the agreement it will be found that there is a clear, distinct and unequivocal intent that the railway should be leased until the consummation of the sale, and full provision is made as to the rights and liabilities of the respective parties with reference to the sale of the property and as to its lease. The distinction between the sale and lease features of the agreement is maintained throughout. The eighth clause, in particular, exemplifies this, for it provides that "the said party of the first part covenants and agrees to and with the party of the

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second part that upon the arrival of the time for the consummation of the sale hereinbefore agreed upon it will convey the property sold to the party of the second part by good and sufficient deed with usual covenants of warranty; and that during the term of said lease, the rent reserved being paid and all other terms of said lease being fulfilled, it will warrant and defend the peaceful occupation and enjoyment of the demised premises, and of every part thereof, to the party of the second part against the lawful claims of all persons." But it is unnecessary to elaborate further on the double nature and purpose of the agreement. A careful reading of it will demonstrate without doubt that, until the consummation of the sale, the line of railway was to be leased. The distinction between these two features of the agreement is too plain to justify us in holding with the learned judge of the court below that the lease was a mere incident of the contract. There is no good reason why, if parties choose so to contract, they may not agree to lease a property, and, upon the happening of a future act or contingency, mature the lease into a sale. We conclude, therefore, that the agreement of August 20, 1884, was of the dual character referred to, and had a twofold purpose; or, in other words, it operated as an executory contract of sale, but until the consummation of the sale it was agreed that there should be a lease of the property. This view disposes of the contention of counsel for appellant, earnestly pressed on the court, that, if the agreement be regarded as a contract of sale, it is void, because under the laws of California, as is contended, railroad companies have no power to sell their roads, or any part thereof. But, whatever may be the law of California on that question, and assuming, for the purposes of the case, although not deciding, that such is the law, this would not affect and invalidate the agreement of August 20, 1884, in so far as it operates as a lease. That a contract may be void in part and valid in part is elementary law. We have seen how studiously the two features of the agreement, viz. that of sale and of lease, were kept separate and distinct. Assuming, therefore, that the agreement is void as a contract of sale, still it would be valid as a lease. Chicago, St. L. & N. O. R. Co. v. Pullman South. Car Co., 139 U. S. 79, 91, 11 Sup. Ct. 490; Erie Ry. Co. v. Union Locomotive & Express Co., 35 N. J. Law, 240, 246; Treadwell v. Davis, 34 Cal. 601; Lumber Co. v. Hayes, 76 Cal. 387, 393, 18 Pac. 391. That railroad companies have the power to lease their roads, or any part thereof, is expressly provided for by the act of 1880. St. Cal. 1880, p. 21. Under section 17 of its charter, the Atlantic & Pacific Railroad Company had the "power" to lease. Act July 27, 1866 (14 Stat. 292). One of the provisions of the agreement, in so far as it was a lease, was that the Atlantic & Pacific Railroad Company should "promptly pay and discharge all taxes and assessments which should thereafter become due upon said property, or any part of it, or which might become in any wise due or owing in respect to the same." This provision was binding on the lessee so long as the lease endured. When the receivers were appointed, they did not disaffirm the lease. On the contrary, it was affirmed by their continued use and occupation of the line of rail-

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way. Such being the fact, the Atlantic & Pacific Railroad Company was bound to perform its agreements under the lease, and, among others, to pay its just proportion of taxes. In fact, one of the conditions of the receiverships was that all taxes then due should be paid. This disposes of the first question, viz. whether the Atlantic & Pacific Railroad Company was liable to the Southern Pacific Railroad Company, under the conditions of the agreement of August 20, 1884, for its just proportion of taxes for the fiscal year 1887–1888, and brings us to the second and third propositions involved on this appeal, which will, for the sake of convenience, be considered together. The second proposition is whether or not such claim for taxes constitutes a preferential claim to that of the mortgage liens; and the third is, if it does constitute a preferential claim, in what amount should it be allowed?

With reference to the second proposition, we think there is no room for doubt that this claim for taxes constitutes a preferential claim to that of the mortgage liens. In the first place, it was made a condition of the receivership. In the order appointing the original receivers, the court below directed them, among other things, to pay "all amounts now due from the defendant (the Atlantic & Pacific Railroad Company) on its roads or properties constituting part of its system for taxes and assessments upon the property, or any part thereof." The subsequent order, appointing the present receiver, contained similar directions. In the second place, the agreement of August 20, 1884, under which the taxes were due, never having been disaffirmed by the receivers, it follows that it still continued in force, and the Atlantic & Pacific Railroad Company was subject to all the obligations thereunder just as much as it was entitled to all the advantages and benefits thereunder. The language of the learned judge of the court below, in this connection, is pertinent. He said:

"The evidence in the case, as well as those findings of the special master not excepted to, show that the receivers not only paid, from time to time, every installment of rental that has become due under the contract of August 20, 1884, but also all of the taxes that have become due on the property therein described, except the portion of the taxes for the year 1887 here in controversy. And the evidence also shows that several of these installments of rental were paid with money borrowed by the receivers upon receivers' certificates authorized to be issued for that purpose by this court, upon representations made by the receivers, not only showing the necessity of borrowing because of a lack of funds, but also showing that the line of road forming the subject of the contract of August 20, 1884, is an essential part of the Atlantic & Pacific Company's railroad system, and constitutes the only western outlet and inlet by rail for traffic moved over that system, and has been in the continuous and exclusive possession, use, and control of that company, and the receivers of its property, from the time that company first took possession of the property under the contract in question. Those representations by the receivers are, in effect, admitted to be true by the various pleadings filed in the cause by the Mercantile Trust Company and the United States Trust Company, respectively. If, therefore, it be conceded that the contract of August 20, 1884, ever admitted of disaffirmance by the receivers, it has been affirmed over and over again by them, and it is now too late for either of the parties to the present suit to here set up any right of election in respect thereto."

It further appears that on January 11, 1895, the former receivers of the Atlantic & Pacific Company paid the sum of $14,902.86 on

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account of the very taxes now in question. The present claim is, therefore, merely for the balance claimed to be due. We think, on the whole, that the taxes for the fiscal year 1887–1888 were due, although the precise amount thereof may not have been ascertained until the decision of the United States supreme court (162 U. S. 167, 16 Sup. Ct. 794) in the case involving the liability of the Southern Pacific Railroad Company for the taxes was rendered, and that the orders appointing the receivers were broad enough to include the proportion of taxes due by the Atlantic & Pacific Railroad Company to the Southern Pacific Railroad Company for that year, and that such proportion of taxes is entitled to preference over the mortgage lien.

We next inquire as to the proportion of the taxes for 1887–1888 which the Atlantic & Pacific Railroad Company was called upon to reimburse to the Southern Pacific Railroad Company under its agreement of August 20, 1884. Undoubtedly, the laws of the state of California, under which the taxes were assessed and collected, entered into and became part of the agreement with respect to the payment, by the Atlantic & Pacific Railroad Company, of the taxes assessed upon the leased line of railway. By the law of the state the taxes are assessed against the owner. The taxes for the fiscal year 1887–1888 were, therefore, assessed against the Southern Pacific Railroad Company, the lessor of the line of railway involved in the present controversy, and not against the Atlantic & Pacific Railroad Company, the lessee. The valuation returned by the Southern Pacific Railroad Company on its franchise, roadbed, rails, rolling stock, etc., within the state of California, including the line of railway from The Needles to Mojave, was $9,570,200. This valuation was raised by the state board of equalization to $16,500,000. The Southern Pacific Railroad Company contested this increase, but the tax was upheld by the courts. 38 Pac. 912; 162 U. S. 167, 16 Sup. Ct. 794. No question, therefore, of the validity or legality of the tax can now be indulged in, nor can the amount thereof be inquired into. The only question with which the court below was concerned, and which is involved on this appeal, is as to the proportionate amount which the Atlantic & Pacific Railroad Company is to repay to the Southern Pacific Railroad Company. The amount of tax imposed on the valuation of $16,500,000 for 1,022.33 miles of railway was $251,134.26, or at the rate of $16,139.60 per mile, which of course, included rolling stock, etc. The number of miles of railway leased by the Atlantic & Pacific Railroad Company from the Southern Pacific Railroad Company was some 242.37 miles, of which 35.64 miles were in Kern county and 206.87 miles were in San Bernardino county. As the Atlantic & Pacific Railroad Company did not lease the rolling stock of the Southern Pacific Railroad Company, but only its line of railway in the two counties referred to, a certain percentage was allowed by the Southern Pacific Railroad Company in computing the amount due from the Atlantic & Pacific Railroad Company for the proportion of taxes due from the latter company to the former under their agreement of August 20, 1884. This percentage for the year 1887–1888 was fixed by the Southern Pacific Railroad Company at 14.50 per

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cent., which amount has not been questioned in this controversy, and must, therefore, be taken as correct. Allowing for this percentage for rolling stock, would make the tax per mile the sum of $13,799.36, and the amount due from the Atlantic & Pacific Railroad Company to the Southern Pacific Railroad Company would be as follows:

Kern county, 35.64 miles railway at $13,799.36 per mile, $491,809.19 at $2 per $100	$ 9,836 18
San Bernardino county, 206.87 miles railway at $13,799.36 per mile, $2,854,673.60, at $1.33 per $100	37,967 15
	$47,803 33

This total of $47,803.33, according to the rate of taxation fixed by the law of the state of California, through its assessing officers, and confirmed by the tribunals of the state and of the United States supreme court, fixes the amount due from the Atlantic & Pacific Railroad Company as its just proportion of taxes due to the Southern Pacific Railroad Company, and this was the amount paid by the latter company to the state. The special master, in this connection, found (finding No. 16) that:

"The value of the leased property, for the purposes of taxation for the year 1887, considered separately from any franchises or rolling stock (and taking into consideration the fact, which I find to be true, that the cost of operating the leased property has for many years prior and subsequent to the appointment of the receivers herein exceeded its earnings), was $4,000 per mile, or a total of $969,480, which is 5.39 per cent. of the entire valuation of the franchises, roadway, roadbed, rails, and rolling stock of the Southern Pacific Railroad Company in California, as fixed by the state board of equalization for that year."

Upon exceptions, this finding was overruled by the court below. In this, we think, the court was entirely correct. The evidence objected to and admitted, tending to show what the earnings of the Atlantic & Pacific Railroad Company were for the year 1887 and prior thereto, was erroneously admitted, and was irrelevant, and incompetent to fix the tax due by the Atlantic & Pacific Railroad Company to the Southern Pacific Railroad Company for the year 1887–1888. The taxes which were comprehended and contemplated by the agreement of August 20, 1884, were those fixed by law. The taxes in the present instance are based upon the assessment and apportionment made by the state board of equalization, under the provisions of the constitution and laws of the state of California, and that assessment and apportionment were held to be valid by the superior court of the city and county of San Francisco, by the supreme court of the state of California, and finally by the supreme court of the United States. The admission of the evidence tending to show any other basis or rate of taxation was, in effect, a collateral attack upon the assessment and apportionment of the state board of equalization, and also upon the judgment and decision of the courts, which sustained the validity of the assessment. Unsupported by the evidence which, we hold, has been erroneously admitted, the findings cannot stand. The nineteenth finding of the special master was to the same effect, was overruled by the court below, and, we think, properly so.

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Several other objections are presented by counsel for appellant as to the validity of the tax, but, as we consider them untenable, it is not necessary, in our opinion, to protract this already lengthy opinion, by a detailed consideration of them. It follows, from the views stated, that the taxes for which the Atlantic & Pacific Railroad Company was liable to repay and reimburse the Southern Pacific Railroad Company under its agreement of August 20, 1884, and the laws of the state of California with reference to the taxation of the line of railway in question, as sustained by the decisions of the courts previously referred to, was the sum of $47,803.33, less any sum which the Atlantic & Pacific Railroad Company may have previously paid on account of these taxes. It appears that it had paid to the Southern Pacific Railroad Company the sum of $14,902.86 on a reassessment for the fiscal year 1887–1888. This amount, with certain items of interest credited by the Southern Pacific Railroad Company, would amount to the sum of $17,681.82, which should be deducted from the amount of taxes as stated above, leaving a balance as follows: $47,803.33, amount of taxes for fiscal year 1887–1888; $17,681.82, amount credited; $30,121.51, balance due for taxes.

The next and final question is whether the Atlantic & Pacific Railroad Company should reimburse the Southern Pacific Railroad Company for a just proportion of the attorney's fees, costs of suit, interest, etc., incurred by the latter company in contesting and litigating the taxes for the fiscal year 1887–1888. When the taxes for the year 1887–1888 were assessed by the state board of equalization at the increased valuation of $16,500,000, the Southern Pacific Railroad Company contested the same. It was, however, unsuccessful in the litigation, and, in addition to having to pay the full amount of the tax imposed, amounting, as stated, to $251,134.26, incurred certain additional expenditures, such as accrued penalties, costs of suit, attorney's fees, interest, etc. In the bill presented by it to the Atlantic & Pacific Railroad Company, it sought to charge that company with a certain proportion of these additional costs. The proportion charged was fixed at 19.03 per cent. that being the percentage which the sum of $47,803.33, the amount of taxes charged to the Atlantic & Pacific Railroad Company, bore to the total tax of $251,143.26, charged as taxes against the Southern Pacific Railroad Company. The special master found that the Atlantic & Pacific Railroad Company was not called upon to reimburse the Southern Pacific Railroad Company for its expenses incurred in that behalf, as he found the fact to be that the "action of the intervener, the Southern Pacific Railroad Company, in refusing to pay said taxes levied and assessed for the fiscal year of 1887, ending June 30, 1888, and in defending the said suit of the state of California therefor, was wholly voluntary upon its part, and was in no manner induced or caused by any request, consent, or advice upon the part of the defendant the Atlantic & Pacific Railroad Company, represented by W. C. Hazeldine, its general attorney, or other attorney, officer, or agent having authority in the premises, or upon the part of the present or former receivers herein, or of any attorney or represen-

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tative of such receivers." The court below, in passing upon the exception taken to this finding, sustained the exception, and held that the Atlantic & Pacific Railroad Company was liable for a proportionate share of the penalty, costs, attorney's fees, interest, etc., incident to the litigation, and fixed such proportion at 19.03 per cent. as charged in the bill presented by the Southern Pacific Railroad Company to the Atlantic & Pacific Railroad Company. The learned judge based this determination on the ground that the evidence tended to show that Mr. Hazeldine, as solicitor for the Atlantic & Pacific Railroad Company, had authority to act as such solicitor for the company in respect to the matter of these taxes, and that he, as such solicitor, consulted with the legal representatives of the Southern Pacific Railroad Company in connection with the very taxes in question, and acquiesced in and consented to the contest made by the Southern Pacific Railroad Company against the taxes in question. In this, we think, the learned judge was correct. Had the Atlantic & Pacific Railroad Company desired to avoid the additional penalty, attorney's fees, interest, and costs incurred by a failure to pay the taxes when due and when contested, it could have offered its part of the taxes, and thereby absolved itself from any liability in that direction. From the foregoing opinion it follows that the claim of the Southern Pacific Railroad Company for taxes for the fiscal year 1887–1888 should be allowed and paid by the receiver, amounting, after crediting certain sums previously stated, to the balance of $30,121.51, and that that part of the claim which relates to the proportion claimed for interest, costs of suit, attorney's fees, etc., be allowed as charged in the bill. The judgment and decree of the circuit court will be affirmed.

(88 Fed. 181.)

MOSS v. DOWMAN.

(Circuit Court of Appeals, Eighth Circuit. June 27, 1898.)

No. 1,041.

1. PUBLIC LANDS—HOMESTEADS—RELINQUISHMENT—BONA FIDE SETTLERS.
   When, on the relinquishment of a homestead entry, the land is, and for some time past has been, in the possession of another, who is a bona fide settler, his rights as such immediately attach to the exclusion of a third person, who procures the relinquishment to be made, and who simultaneously with the relinquishment tenders an application for entry of the lands, and immediately enters thereon and makes improvements.
2. SAME—RULINGS OF LAND DEPARTMENT—EQUITY JURISDICTION.
   It is only when it is made plain that the officers of the land department have, by a mistake of law, deprived a party of land to which he is rightfully entitled, that a court of equity is justified in setting aside the action of the department.[1]

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[1] As to conclusiveness and effect of decisions of land department, see note to Hartman v. Warren, 22 C. C. A. 38, and supplementary note to Carson City Gold & Silver Min. Co. v. North Star Min. Co., 28 C. C. A. 344.

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Appeal from the Circuit Court of the United States for the District of Minnesota.

The bill in this case was filed in the circuit court for the district of Minnesota, for the purpose of determining the ownership of 160 acres of land situated in that state, as between the complainant and defendant, it appearing that the legal title of the land is vested in the defendant, Richard Dowman, under a patent of the United States duly issued to him under date of March 17, 1897. A demurrer to the bill was filed, and, after argument, was sustained by the circuit court, the bill being dismissed for want of equity, and the complainant now seeks to obtain a reversal of the decree dismissing the bill. From the facts recited in the bill and the exhibits attached thereto, it appears that on May 7, 1890, one Robert H. Doran had made a homestead entry of the land in the United States land office at Duluth, Minn., which he subsequently relinquished, and thereupon the complainant filed this relinquishment in the land office, and made application to be allowed to enter the same in her own behalf. On November 18, 1890, Richard Dowman, the defendant, filed in the land office an application for the entry of the land as a homestead, accompanied with an affidavit stating that he had made an actual settlement on the land on the 19th of September, 1890, having built a house thereon, and that he was in exclusive possession of the premises when Doran's entry was relinquished, on the 24th of October, 1890. For the purpose of determining the rights of the parties, hearings were had before the receiver and register of the local land office, who did not agree in their conclusions, and the case then went before the commissioner, who decided in favor of the complainant, Moss, and thereupon an appeal was taken to the secretary of the interior, before whom the matter was fully heard, and by whom the facts were determined, and stated as follows: "The land involved in this controversy lies in the First school district of Cook county, state of Minnesota. This county is a very large one, being fifty miles long east and west, and eighteen miles wide north and south at the east end, and fifty miles wide north and south at the west end. The northern line of the county is the southern line of Canada. The land in controversy lies in the northern central part of Cook county, near the Canadian line. To use a description made by Miss Moss, the defendant, 'the land was situated in the wildest and most unbroken wilderness, without roads, or even foot trails, through Minnesota for the settlements, distant by rail from Duluth over nine hundred miles. The nearest post office is fifty miles away, and telegraph nearly one hundred miles distant.' Richard Dowman, the settler and contestant in the case, had lived for a number of years in Grand Marais, the county town of Cook county, distant fifty miles southeast of the land, and in the same school district. He was a member of the First district school board, a county commissioner, was unmarried, and his occupation, besides the two county offices, appears to have been that of an explorer and guide for parties going through that part of the country. The evidence does not show that he had any other visible means of support or possessed much money. Although numerous persons have made homestead entry of this land, none appear to have done so in good faith, for none appear to have made any settlement during the period of five years it was entered and relinquished every six months. Dowman, according to his own testimony, knowing the land had been thus entered and relinquished a number of times without any of the entrymen attempting to make settlement thereon, went on the land September 19, 1890, and began the construction of a house, which he finished October 10th following. From that time he made the land his home, actually living there continuously until November, 1890, with the one exception of a trip to the county town for provisions, which he made October 19, 1890, returning October 24, 1890, the day Doran's relinquishment was filed. From November 1, 1890, to the date of the hearing, he has been temporarily absent for days at a time in Grand Marais, the county town of Cook county, a village of one hundred and twenty inhabitants, but which, although fifty miles distant, lies in the same school district as does the land in controversy. This absenteeism appears owing largely to the fact that Dowman was a member of the school board and a county commissioner, two distinct offices, and to fulfill the duties of which he was compelled to go to the county town. The county town was also the

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nearest point at which provisions could be obtained. Owing to the distance, the absence of transportation, and the difficulties of the route, it required two days to make the trip, and Dowman appears to have on occasions been absent quite a number of days at a time from his claim. But this does not necessarily show bad faith, and the department always presumes temporary absences to be for good reasons, and, before a contrary reason will be accepted, facts must be disclosed which prove it. In this case no such facts have been produced, and nothing to show Dowman had any other home than that on the land in controversy, beyond a room, over the store of a friend, which he occupied in the county town on these visits. Moss was a school teacher in Grand Rapids, Mich., and had taught school in cities for a period of twenty years. She was unmarried, about forty years of age, and had $4,000 in cash, and a farm in Dakota yielding an income of from $100 to $250 per annum, while her salary was $60 per month. She bought the relinquishment of the land solely on the representations of her Dakota agent, from Doran, who, as previously shown, had been erroneously allowed to make entry of the land. Without knowing anything of the land except from her agent, and without ever having been nearer than one hundred and sixty miles on an air line, and nine hundred miles by rail, she paid $1,000 for the relinquishment. The evidence shows that at that time Dowman was a settler living upon the land. Returning to Grand Rapids, Mich., over one thousand miles from the land by the nearest route, although she had sworn she made entry on the land with the purpose of making settlement thereon, Moss continued to teach school until the latter part of March, five months after her entry, and after she had been served with a notice of Dowman's contest. The following month she made the trip to the land, arriving there two days before the expiration of the first six months after her entry. Pitching a tent within sight of Dowman's house, in which he was living, she began the erection of improvements so near to Dowman's cabin that the clearings joined, erecting a residence that cost $700, and all the furniture and conveniences that money could buy to make it comfortable for a woman to reside in. All this expenditure and improvement were made in the face and with a knowledge of Dowman's claim and prior settlement, and therefore made at Moss' own risk, and it would appear, for the purpose of defeating his claim, if possible, by means of superior improvements, in spite of the long-established and well-known ruling of this department in such cases. The character or value of Moss' improvements gives her no advantage. Because she had more money than Dowman to expend on improvements does not detract from his rights. In view of these facts, and that no evidence has been introduced which shows that Dowman's settlement was not made in good faith, under the established ruling of this department, the settler Dowman's right attaches instantly on the filing of Doran's relinquishment, and is therefore superior to Moss' entry." Based upon this decision, the land department issued a patent of the land to Richard Dowman, and thereupon the present bill was filed, in which it is prayed that complainant be adjudged to be the owner of the land, and that the defendant holds the legal title as trustee for complainant.

James K. Redington (Warren N. Draper, on brief), for appellant.
L. C. Harris, for appellee.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge, after stating the case as above, delivered the opinion of the court.

In the brief filed by counsel for appellant, it is admitted that it is well settled that "all questions of fact presented and decided in a controverted proceeding, where both parties are heard, are concluded by the department decision, and are binding on the court. But where the officers of the land department have, by a mistake of law, given to one man the land which, upon the facts found, belongs to another,

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equity will grant relief by putting the title where of right it ought to be." In this case it appears that a controverted proceeding was had between the parties before the secretary of the interior, in which it has been decided that at the time, to wit, October 24, 1890, when complainant made application to enter the land, Dowman was then a settler thereon in good faith, and, this being true as a matter of fact, the only question of law arising thereon is whether the complainant could make a homestead entry thereof which would be effectual against the pre-existing actual occupancy of Dowman. On behalf of appellant it is argued that Dowman cannot be permitted to take advantage of the entry and occupation by him initiated September 19, 1890, because the land was not then open to homestead entry by reason of the then pending application of Doran; that, the land being thus segregated from the public lands open to entry, the attempt of Dowman to obtain a settlement was illegal, and, the attempted entry being illegal, no rights can grow out thereof, on the principle that no person should be permitted to obtain an advantage by reason of his own wrong or illegal acts. The action of Dowman in going upon the land, for the purpose of making a homestead thereon, was not illegal or wrongful, within the meaning of the rule invoked. When Dowman's entry was made no one was upon the land, and there was nothing to show that any one claimed it, except the entry of Doran's application on the records of the land office at Duluth, some hundreds of miles distant. If Doran's application had ripened into a title, Dowman's actual entry on and settlement of the land would have been ineffectual to defeat it, but it would be effectual and legal against all parties whose rights were acquired subsequent to the entry thus made. By the relinquishment of Doran's claim, the land became again subject to entry, and Dowman's actual possession and occupancy at once became effectual in his favor. His action in taking possession in September, and continuing the same thereafter, might have been ineffectual as against Doran, but such action was not illegal and wrongful in such sense that he cannot claim the benefit thereof as against the appellant, whose entry was not made until the 24th day of October, 1890. The facts show that Doran's entry was relinquished on that day, and the land was then restored to the unappropriated public domain. When this restoration of the land took place, Dowman was a settler thereon in good faith, living on the land, and his rights attached as soon as the land became subject to entry. The facts, as found by the secretary of the interior, show that Dowman was in possession of the land, in good faith, for homestead purposes, during the whole of the 24th day of October, 1890; and, as a matter of fact, it is impossible for the appellant to show that, when she filed her application in the land office on that day, the land was not then in the possession of Dowman, and she is of necessity driven to claim, as matter of law, that Dowman's entry was illegal and wrongful, and that, as her application was filed in the land office at the same time she filed the Doran relinquishment, she becomes entitled to the benefit of the Doran entry, as against the effect of the existing possession by Dowman. The evidence shows that appellant paid Doran $1,000 to re-

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linquish his entry, but by this payment she did not become the assignee of Doran's rights or entry. The payment was made in consideration of Doran relinquishing his entry, in order that thereby the land might be restored to the unappropriated public domain, and thus become open to other entries. It is not open to appellant to insist that she is, in any sense, the successor to, or assignee of, the Doran entry. The payment to Doran of the sum named created no equity or right in favor of appellant as against Dowman, and the only legal effect that can be given to the relinquishment executed by Doran is that thereby the land became again open to appropriation under the homestead act, and, being thus released from the effect of the Doran entry, the appellant made application at the land office to enter the land, which application is in law effectual from its date; but the fact, as found by the secretary of the interior, is that, when this application was made, the land was then occupied by a bona fide settler, and there is no legal or equitable ground for holding that the right conferred by such prior possession and occupancy must be postponed to the right created by the application filed in the land office.

Counsel for appellant claim that their position is sustained by the ruling of the supreme court in Wood v. Beach, 156 U. S. 548, 15 Sup. Ct. 410. In that case it appeared that Wood, in 1870, had occupied certain lands in Kansas, seeking to make a homestead thereof, which were within the indemnity limits of a railroad grant then existing, and under which the land had been withdrawn from sale or entry by proper orders of the land department, entered in 1867. The final selection of the land under the railroad grant was made in 1872, and the deed from the state to which the title passed under the act of congress was made, in 1873, to the defendant Beach. The supreme court held that the withdrawal orders in 1867 were sufficient to defeat a settlement for homestead purposes taking effect while the orders were in force, because thereby the land was in fact withdrawn from sale or entry, and, as the railway company subsequently perfected its right to the land and made selection thereof, its rights could not be defeated by any supposed equities existing in favor of Wood, who made his homestead entry with full knowledge of the facts. This case would be an authority in point, if the present contest was between Doran, claiming under his entry in the land office, and Dowman, claiming under an actual settlement made after the Doran entry had been filed; but it is not applicable to the question at issue between the present litigants. In the brief submitted for appellant, counsel have cited many decisions of the land department for the purpose of showing that from 1859 to 1885 it was uniformly held "that no right upon cancellation of an entry inured by reason of a settlement made during its existence; that to hold otherwise would be to enable a trespasser to benefit by his own wrong;" and it is therefore claimed, under the rule of stare decisis, that the secretary made a mistake of law in not following the doctrine claimed to be established by the decisions cited; but counsel further show in their brief that, since 1885, modifications of the previous ruling have been made, and recognition has been given to settlements made

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under circumstances similar to those existing in the present case, and that since August 20, 1890, the rulings of the department are to the effect that a settlement made in good faith and prior in time will be held good as against a filing or application tendered simultaneously with the relinquishment or cancellation of a pre-existing entry. It thus appears that if the secretary in this case had held that Dowman's entry and settlement, though made in good faith, were not available to him upon the relinquishment of Doran's entry, such ruling would have been contrary to that established by the later decisions of the department; and certainly it cannot be said that, in following the later rulings, the secretary violated any recognized rule of law; and it is only when it is made plain that the officers of the land department have, by a mistake of law, deprived a party of land to which he is rightfully entitled that a court of equity is justified in setting aside the action of the department. Moore v. Robbins, 96 U. S. 530; Marquez v. Frisbie, 101 U. S. 473; Quinby v. Conlan, 104 U. S. 420.

Being of the opinion that the facts set forth in the bill herein filed do not make a case for the intervention of a court of equity, within the rule laid down in the cases cited, it follows that the trial court did not err in dismissing the bill on the merits, and the decree to that effect is affirmed.

(88 Fed. 197.)

BARROW S. S. CO., Limited, v. KANE.

(Circuit Court of Appeals, Second Circuit. June 24, 1898.)

No. 98.

1. CARRIERS—INJURY TO PASSENGER—INDEPENDENT CONTRACTORS.
   A carrier's obligation to transport his passengers safely cannot be shifted from himself by delegation to an independent contractor, and it extends to all the agencies employed, and includes the duty of protecting the passenger from an injury caused by the act of any subordinate or third person engaged in any part of the service required by the contract of transportation.
2. SAME.
   The agents of a steamship company were charged with the duty of transferring its passengers by tugs or tenders from the port of embarkation, and putting them on board its ships. For this they received a commission, paying the expenses themselves. They employed a steam tender and two persons in charge thereof, and these persons, while plaintiff was being transferred, assaulted him, and confined him in a room of the tender, apart from the other passengers. *Held*, that the steamship company was liable in damages for their acts.

In Error to the Circuit Court of the United States for the Southern District of New York.

Esek Cowen, for plaintiff in error.
F. K. Pendleton, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

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WALLACE, Circuit Judge. The questions presented by the defense of want of jurisdiction of the court below having been certified to the supreme court, and answered adversely to the contention of the plaintiff in error, the questions upon the merits remain to be considered. 18 Sup. Ct. 526.

Error is assigned that the trial judge instructed the jury, in substance, that the defendant was responsible for the acts of Hamilton and Sweeney, one or both. The evidence upon the trial authorized the jury to find that the plaintiff, while being transported from Londonderry to New York as a passenger, pursuant to a contract made by him with the defendant, a common carrier of passengers, was assaulted and maltreated by Hamilton and Sweeney. These persons were in the employ of Henderson Bros., agents for the defendant; Hamilton being a manager for that firm, and Sweeney a porter. Among the duties of Henderson Bros. was that of carrying the passengers of the defendant and their baggage from the city of Londonderry, by tugs or tenders, and putting them on board the defendant's steamships at the mouth of the river. For this purpose they employed the steam tender Osprey. They received a commission, and paid the expenses of the service themselves, and they employed and paid Hamilton and Sweeney. According to the evidence for the plaintiff, while he was on the Osprey, being carried to the defendant's steamship Devonia, he was, without cause, forcibly removed from the part of the vessel occupied by the other passengers, assaulted, dragged into a room, and kept there by Hamilton and Sweeney until the tender reached the Devonia. It was insisted upon the trial that Henderson Bros. were independent contractors for performing that part of the transportation which consisted in transferring passengers from the city to the steamship, and that, because Hamilton and Sweeney were the employés of Henderson Bros., the relation of master and servant did not exist between the defendant and those by whose misconduct the plaintiff was injured.

The rule respondeat superior rests on the power which the responsible party has a right to exercise over the acts of his subordinates, and which, for the prevention of injuries to third persons, he is bound to exercise, and applies only to cases in which such power exists. In those undertakings in which this power, in whole or in part, may properly be devolved upon others, and has been so devolved by a contract which substitutes another in the place of the original principal, and delegates to him exclusively the control of the subordinate agents whom he may find it expedient to employ, the subordinate agents are his servants, and not the servants of the original principal; and the latter is not responsible for their negligent or wrongful acts. But the undertaking of a common carrier to a passenger is not of that character. His obligation to transport the passenger safely cannot be shifted from himself by delegation to an independent contractor; and it extends to all the agencies employed, and includes the duty of protecting the passenger from any injury caused by the act of any subordinate or third person engaged in any part of the service required by the contract of transportation.

The present case is quite analogous to those in which it has been

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held that a railroad company is responsible for the neglect or misconduct of the servants of a sleeping-car company, whereby a passenger sustains loss or injury while being transported under the contract with the railroad company. Pennsylvania Co. v. Roy, 102 U. S. 451; Dwinelle v. Railroad Co., 120 N. Y. 117, 24 N. E. 319; Railroad Co. v. Walrath, 38 Ohio St. 461; Kinsley v. Railroad Co., 125 Mass. 54. In Dwinelle v. Railroad Co. it was held that the porter of a sleeping car was, while assisting the railroad company in carrying out its contract of transportation with the passenger, the servant of the company, although it did not own the sleeping car, or hire or pay the porter; and that, whatever might be the motive which incited him to assault a passenger during the existence of the relations between passenger and carrier, the company was liable. The evidence upon the trial indicated beyond a doubt that the acts of Hamilton and Sweeney were committed under color of the authority which they had been intrusted to exercise over the passengers of the defendant in the usual course of transportation. The defendant was responsible for their acts, notwithstanding they were servants of Henderson Bros. We find no error in the rulings complained of, and the judgment is accordingly affirmed.

(88 Fed. 199.)

CLARK et al. v. HOWARD.

(Circuit Court of Appeals, Eighth Circuit. June 20, 1898.)

No. 1023.

NEGLIGENCE—DEFECTIVE RAILWAY PLATFORM.

One traversing a railway platform merely to deliver an article sold by him to persons on a train is entitled to no higher degree of care on the part of the railroad company with respect to keeping its platform in good condition than is due from a municipality to the public in respect to its streets, and hence it is not liable for injury resulting from mere slipperiness due to sleet and snow recently fallen.

In Error to the Circuit Court of the United States for the District of Kansas.

This was an action at law by William H. Howard against S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, to recover damages for personal injuries. In the circuit court a verdict was returned for plaintiff, and judgment entered accordingly, and the defendants sued out this writ of error.

A. L. Williams (N. H. Loomis and R. W. Blair, on brief), for plaintiffs in error.

Thomas P. Fenlon, Jr. (Thomas P. Fenlon, Sr., on brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

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THAYER, Circuit Judge. This case grows out of an injury which William H. Howard, the plaintiff below, the defendant in error here, sustained by slipping and falling on the platform of a railroad station at Tonganoxie, Kan., which belonged to the Union Pacific Railway Company. The sole question for consideration is whether the defendants below, who are the plaintiffs in error here, were entitled, at the close of the evidence, to a peremptory instruction directing a verdict in their favor. This question must be decided in the light of the following facts, which are practically undisputed: The station house where the accident occurred fronts about east, and was provided with a wooden platform on the east side and at the north end thereof, which was constructed in the usual manner, of planks laid crosswise, and at the time of the accident was in a good state of repair. The platform on the east side of the station house ran parallel with the railroad tracks, and was the one used by passengers when entering or leaving a train. The platform at the north end of the station ran at right angles to the railroad track, and was about 8 feet wide and altogether about 38 feet in length. The ground on the west or rear side of the station was somewhat higher than the railroad tracks, and for that reason the north platform, for a distance of about 15 feet from the point of junction with the east or front platform, was laid on an incline, the descent being not over 1¾ inches to the foot. Persons who desired to go upon the front platform from the west or rear side of the station were in the habit of walking along the platform at the north end of the station, or through the station house, by means of a door on the west side thereof, as happened to be most convenient. The injury complained of was sustained in mid-winter, on January 23, 1896. During the afternoon and evening of the preceding day rain and sleet had fallen. Later in the night it had turned cold and frozen, and some snow had also fallen, the result being that on the morning of January 23d the platform of the station, and the sidewalks and streets of the town where the station was located, were covered with a coating of ice, which was overlaid in most places with a few inches of wet snow that had fallen thereon and frozen. The plaintiff, who was a butcher by trade, was well aware of the slippery condition of the streets and sidewalks at and before the hour when the accident occurred. He testified, in substance, that in the morning of that day he had put on rubbers "because it was snowy and slippery," and that he wore them during the forenoon whenever he found it necessary to go out of his shop upon the streets. Between 12 and 1 o'clock p. m. he had occasion to go to the depot to deliver 33 pounds of meat to a theatrical troupe, who occupied a car that was standing on a side track in front of the station. His route from his shop to this car led him down the street, and along the platform at the north end of the depot building, and thence across the main track to the side track, but he might as well have gone through the station, or obliquely across the right of way, a little to the north of the north platform. While walking down the slope on the north platform he slipped and fell, and broke his right leg, which is the injury complained of.

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There was some conflict of evidence at the trial respecting the question whether any of the snow which had fallen on the north platform during the previous night had been removed before the accident happened, but, according to the view that we have felt ourselves compelled to take of the case, that issue is now immaterial. The plaintiff was well aware that ice had formed on the surface of the platform and sidewalks during the previous night, and that it had been covered with a mantle of snow, and that the sidewalks of the town were slippery, and that care must be exercised in walking over any plank or stone sidewalk, to which the ice had presumptively adhered. Moreover, the condition in which the platform at the north end of the station was in when the plaintiff attempted to walk over it was obvious to the most casual observer, and he could not have been ignorant, and confessedly was not ignorant, of its condition. It was manifest to him, as it must have been to every one who saw it, that it was covered to some extent with snow or sleet, and that, in view of the character of the weather, the presence of snow or sleet would render the platform slippery.

Inasmuch as the plaintiff went to the depot, on the occasion of the accident, not as a passenger intending to board one of the defendants' trains, nor for the purpose of transacting any business with the defendants, but for his individual benefit and advantage, he was using the north platform of the station on that occasion as an ordinary public sidewalk, and for that reason we are of opinion that the defendants owed him no higher duty with respect to keeping it in order than a municipality owes to its citizens and to the public generally with respect to the care of its sidewalks. We know of no reason why the defendants on the occasion in question should be charged with a greater obligation to the plaintiff, or be held to the exercise of a higher degree of care, than the town of Tonganoxie was required to exercise in keeping its sidewalks in a proper condition for travel. It may be conceded, for present purposes, that it was the duty of said town to exercise ordinary care in seeing that its sidewalks were maintained in an ordinarily safe condition for use by pedestrians, and that a similar obligation rested on the defendants with respect to the north platform of their depot; but wherever, by the local law, a duty such as is last mentioned is imposed on municipalities, it is generally held that mere slipperiness, occasioned by snow or ice, which is due altogether to the action of the elements, is not such a defect in a sidewalk or street as will render the municipality liable therefor. Neither is proof that on a certain occasion a sidewalk was thus made slippery by the action of the elements any evidence of negligence or of a want of ordinary care.

A different rule obtains when the surface of a street is allowed to become rough and uneven by the formation of ridges of ice or snow, or by the formation of gullies therein, which are of such a nature as to obstruct travel or render it unsafe and dangerous. A municipality which is charged with the duty of keeping its streets in a passable condition may well be required to see to it that the risks incident to passing over a slippery street or sidewalk are not increased by such

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obstructions as ruts or ridges, but it cannot be expected to remove all snow and ice from its sidewalks, or to guard against mere slipperiness which is due altogether to the action of the elements. Smyth v. Bangor, 72 Me. 249; Stanton v. City of Springfield, 12 Allen, 566; Nason v. City of Boston, 14 Allen, 508; Luther v. City of Worcester, 97 Mass. 268, 271; Gilbert v. City of Roxbury, 100 Mass. 185; Cook v. City of Milwaukee, 24 Wis. 270, 274; City of Chicago v. McGiven, 78 Ill. 347, 352; Todd v. City of Troy, 61 N. Y. 507; Pomfrey v. Village of Saratoga Springs, 104 N. Y. 459, 11 N. E. 43; Blakeley v. City of Troy, 18 Hun, 167; Darling v. Mayor, etc., Id. 340; Caswell v. Road Co., 28 U. C. Q. B. 247; Shear. & R. Neg. § 363.

In the case at bar the evidence shows no other defect in the platform where the injury was sustained than that it had been rendered slippery by sleet which had fallen and frozen only a few hours before the accident occurred. The platform does not appear to have been rough, but a coating of ice or sleet had formed quite evenly over its surface. The ice or sleet may have been covered with a few inches of loose snow, but, if such was the case, the plaintiff was well aware of the fact, and ventured upon the platform when he was incumbered with a heavy burden. If he had slipped and fallen on one of the public sidewalks of the town of Tonganoxie under such circumstances, we think that the case would not have disclosed any evidence of culpable negligence on the part of the municipality, and for like reasons we are of opinion that it fails to disclose any evidence of negligence on the part of the defendants which would warrant a recovery.

In conclusion, it should be observed that, at the plaintiff's instance and request, the trial court gave the following instruction:

"But if the plaintiff was aware of the slippery and dangerous condition of the platform, and chose to go across it instead of going around it, he took the risk on himself, and cannot recover, although the defendants were guilty of negligence in failing to properly clean it or put it in a safe condition."

Assuming this to be a correct declaration of law applicable to the facts of the case, of which the plaintiff cannot complain, we think that the trial court should have directed a verdict for the defendants, since it appears from the plaintiff's own admissions that he was aware of the slippery condition of the platform, and chose to walk across it or along it with a burden which incumbered his movements, and rendered him more liable to slip and fall, when, without any apparent inconvenience, he might have avoided the platform altogether, either by going through the station or across the right of way to the north of the platform. For error in refusing to direct a verdict for the defendants, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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(88 Fed. 203.)

GREENE v. SIGUA IRON CO.[1]

(Circuit Court of Appeals, Second Circuit. October 21, 1896.)

1. CORPORATION—CONTRACT TO BECOME STOCKHOLDER—TRANSFER OF STOCK.
An agreement to purchase from a syndicate a certain number of shares of stock in a corporation, which had been subscribed for by the syndicate, but had not yet been issued, "or a proportionate part in case of oversubscription," is not a contract of purchase, which renders the purchaser a stockholder in the corporation on a subsequent transfer of the stock to him without his knowledge, but is merely an executory engagement to purchase, which renders him liable for damages for its breach on his failure to perform.

2. CONTRACTS—CONSIDERATION—UNILATERAL UNDERTAKING.
A writing by which the subscribers promise to purchase from the owners certain shares of stock in a corporation, but which contains no agreement on the part of the owners to sell is not a valid contract for want of consideration, but is merely a unilateral undertaking, which may be retracted by a subscriber at any time before it has been acted upon by the owners by a transfer of the stock.

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by the Sigua Iron Company against Benjamin D. Greene. Judgment for plaintiff, and defendant appeals.

Kellogg, Rose & Smith, for plaintiff in error.

Wm. B. Hornblower and Howard A. Taylor, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff entered upon a verdict of a jury. The action was brought to recover of the defendant, as a stockholder of the corporation plaintiff, the amount of certain calls for installments due and unpaid upon 400 shares of stock. The assignments of error raise the question whether there was sufficient evidence in the case to support the ruling of the trial judge refusing to direct a verdict for the defendant, and leaving it to the jury to determine as an issue of fact whether the defendant ever became a stockholder of the plaintiff. It was not alleged that the defendant was liable for the calls as a stockholder of the corporation by original subscription, but the theory of the action was that he became a purchaser of 1,000 shares, and a stockholder by the transfer of those shares to him upon the books of the corporation. It appeared in evidence that certain individuals known as the "Sigua Syndicate," the promoters of the enterprise which the corporation was organized to carry on, were, by an agreement with the corporation, entitled to 29,995 shares of its capital stock, of the par value of $100 per share, subject to calls and assessments to the extent of

[1] This case was originally reported in 76 Fed. 947, but is now re-reported in order to supply certain sentences which were inadvertently omitted from the original copy of the opinion.

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35 per cent. In May, 1890, the plaintiff and certain other persons severally signed an instrument which read as follows:

"We, the undersigned, hereby agree with the Sigua Syndicate to purchase from them, at $35 per share, the number of shares (of the par value of $100 each) set opposite our names, respectively, the same being 65 per cent. paid, and liable to further calls and assessments to the extent of 35 per cent.; said 35 per cent. being payable one-tenth, or ten per cent. thereof, on call, and the remainder as required, probably at the rate of one-tenth, or ten per cent., of said 35 per cent. every two months, or a proportionate part in case of over-subscription."

The defendant subscribed for 1,000 shares. The instrument was delivered to one Smith as trustee for the syndicate. July 8, 1890, the corporation duly issued a certificate to Smith, as trustee for the syndicate, for the 29,995 shares. July 9, 1890, Smith, as trustee, executed an assignment of 1,000 of these shares to the defendant, and the corporation, upon Smith's request, transferred upon its stock ledger the 1,000 shares to the defendant, and issued two certificates therefor in the name of the defendant, one for 600 and the other for 400 shares. The defendant had previously declined to take the 400 shares, insisting that the subscription was made upon the condition that he should not be required to pay for any of the shares which he might not be able to place with or sell to other persons, and that he had been unable to dispose of 400 shares. He afterwards accepted the certificate for 600 shares, but did not take the one for 400 shares, and it was not delivered to him, but thereafter always remained in the possession of the corporation. Calls for payment of installments were duly made by the board of directors from time to time, but no notice of a call was ever sent to the defendant. The amount due on unpaid installments of 400 shares at the time of the trial was $14,000 principal and $5,790.96 interest; in all, $19,790.96. For this amount the jury rendered a verdict for the plaintiff. The trial judge seems to have assumed that the subscription by the defendant evidenced a purchase of the shares, and instructed the jury that it was of itself a sufficient authorization to the corporation to make the transfer upon its books to defendant.

It is entirely clear that a person cannot be constituted a shareholder in a corporation by a transfer of shares without his consent. The transfer of shares on the books to a person who refuses to accept them or recognize the act in any way does not change his position in regard to the corporation. That a purchase of shares from an existing stockholder, which is sufficient, as between the parties, to devest the title of the vendor, and vest it in the vendee, and is intended to do so, is of itself an implied delegation of authority to the vendor, consequently to the corporation, to cause the requisite transfer to be made upon the books of the corporation, we do not doubt. The vendor is entitled, as against the vendee, to be relieved from further liability as a stockholder, and the vendee is entitled, as against the vendor, to all the rights of a stockholder; and the intention of the parties cannot be fully effectuated without the transfer upon the books. The very essence of such a contract is that the seller shall relinquish and be relieved from, and the purchaser assume, all future benefits and liabilities in respect of the shares. Grissell v. Bristowe,

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L. R. 3 C. P. 112. Because the vendor is entitled to be relieved from these liabilities, it has been held that, where he has been obliged to pay the debts of the corporation in consequence of the failure of the vendee to cause the transfer to be made upon the books, he may recover the amount so paid in an appropriate action. Johnson v. Underhill, 52 N. Y. 203; Castellan v. Hobson, L. R. 10 Eq. 47; Walker v. Bartlett, 18 C. B. 845; Wynne v. Price, 3 De Gex & S. 310. In Webster v. Upton, 91 U. S. 65, the court declared that it was the duty of the vendor of shares to make the transfer to the purchaser on the books of the company, and that the purchase was of itself an authority to the vendor to cause such a transfer to be made. The court said: "It is clear that the vendor may himself request the transfer to be made, and that when it is made at his request the buyer becomes responsible for subsequent calls." See, also, Wheeler v. Millar, 90 N. Y. 353. It was held in Glenn v. Garth, 133 N. Y. 18, 30 N. E. 649, and 31 N. E. 344, that a broker who had purchased shares from another broker without giving the latter express authority to cause the transfer to be made upon the books of the corporation did not become a stockholder notwithstanding the selling broker had caused the transfer to be made. This doctrine would result either in compelling a vendor whose shares have been purchased to continue to be a stockholder, and subject to all the liabilities of that relation, or in relieving both vendor and vendee from the obligations of that relation to the corporation and its creditors. But it is unnecessary to consider the question upon principle, as the adjudication in Webster v. Upton is controlling upon this court. If by agreement between the defendant and the Sigua Syndicate the defendant had acquired the title to the 1,000 shares, the doctrine stated would be applicable. But the subscription did not vest in him any particular shares or number of shares, and was not intended to do so. When it was signed, the syndicate did not have legal title to the shares, because they had not at that time been transferred to the syndicate upon the books of the company. It was uncertain how many of the shares were eventually to be taken by the defendant. He promised to purchase a thousand shares, "or a proportionate part in case of oversubscription." It was merely an executory engagement for the purchase of shares, which, if it had been valid, would have rendered the defendant liable in damages for a breach upon his refusal to perform. But it was not a valid contract because of want of consideration. Bish. Cont. § 77.

The subscription was a purely unilateral undertaking, without any concurrent undertaking on the part of the syndicate. If the syndicate had refused to transfer the shares to the defendant, and he had sought redress for his damages, it would have been a complete answer to his action that there was no promise on the part of the syndicate to transfer to him any shares.

Whether a consideration is necessary to support the promise of a stockholder by subscription, and how the consideration is constituted, are questions which have been much discussed; and, as is said by a recent commentator, "the courts, in their search for the consideration of such a contract, have indulged in a variety of specula-

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tions more curious than useful." Thomp. Corp. § 1200. The most approved reasoning seems to be that upon the acceptance by the corporation of the subscription the subscriber is immediately invested with the privileges of a stockholder, and the rights thus acquired are a sufficient consideration for his promise. But, as is pointed out by Mr. Morawetz (Priv. Corp. § 134):

"This reasoning has no application in case of a contract to purchase shares, or to become a shareholder in a corporation at a future time. A contract of this description is an ordinary common-law contract, and is subject to all the technical rules governing common-law contracts. The promise to pay for shares, and the corresponding promise to deliver them, or to receive the purchaser as a shareholder, are concurrent, and each constitutes the consideration for the other. Without a consideration neither promise would be binding."

There are unilateral contracts, which are, in effect, a request or proposal to the promisee, in which it is not necessary that the consideration should exist at the time of making the promise, and where, if the promisee acts upon the promise, it becomes obligatory; but in this class of contracts the promisor may always retract before performance by the promisee, and in the intermediate time the promise is inert. That a unilateral promise to sell cannot be enforced by a party who has not agreed to buy, but subsequently notifies his acceptance of the offer to sell, was decided as long ago as the case of Cooke v. Oxley, 3 Term R. 653. Inasmuch as the defendant retracted his promise before the shares were transferred to him, it is unnecessary to consider whether his subscription can be regarded as belonging to the class of unilateral contracts which have been referred to. The case is one where the defendant never became a stockholder of the corporation, and because the trial judge declined to direct a verdict for the defendant upon this ground we conclude that the judgment should be reversed.

Application for Reargument.

(December 8, 1896.)

WALLACE, Circuit Judge. The application which has been made for a reargument of this cause is based largely upon the ground that the points upon which the decision of the court proceeds were not discussed in argument or upon the briefs. The fundamental proposition which it was incumbent upon the plaintiff to establish was that the defendant became a stockholder of the corporation as to the shares in controversy by reason of a transfer of those shares to him upon the books of the corporation; and it was of course essential that the plaintiff demonstrate that the transfer was duly authorized by the defendant. No authority from him was shown, or was claimed to exist, except such as could be implied from the contract with the Sigua Syndicate. The plaintiff insisted that this contract evidenced a purchase of the shares, and consequently imported authority to the vendor and to the corporation to transfer the shares upon its books and treat the defendant as a stockholder. We held the contrary, being of opinion that the contract was merely an executory agreement to purchase, and not a present contract of purchase. If

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this point was not discussed, we can only say that it was the basic point in the case, and a decision could not have been properly reached by the court without considering it and deciding it. As we entertain no doubt of the correctness of the judgment upon this point, and as all the other grounds of the application for a reargument relate to subsidiary questions not affecting the primary one which lies at the very threshold of the controversy, we do not think a reargument would be profitable, and the application is therefore denied.

(88 Fed. 576.)

WALKER et al. v. JACK.

(Circuit Court of Appeals, Sixth Circuit. July 7, 1898.)

No. 534.

1. EQUITY PLEADING—DEMURRER TO ANSWER.
   There is no such thing as a demurrer to an answer in equity. The only way by which the sufficiency of the answer on its merits as a defense can be tested is by setting the case for hearing on the bill and answer.
2. SAME—EXCEPTIONS TO ANSWER.
   The office of an exception to an answer is to raise the question whether the averments and denials thereof are sufficiently responsive to the allegations of the bill; and it cannot be treated as raising the question of the sufficiency of the answer as a defense on the merits.
3. TAXATION—INTANGIBLE PROPERTY OF NONRESIDENTS.
   It is within the power of a state to tax money and credits of a nonresident when the money is invested, the debt contracted, and the investment controlled by a resident agent of the owner, having the evidences of the debt in his possession.[1]
4. SAME.
   Under Rev. St. Ohio, §§ 2731, 2734, 2735, moneys and credits owned by a nonresident of the state, and which are *held*, invested, and controlled for him by an agent residing in the state, are made subject to taxation. 79 Fed. 138, reversed.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This was a suit in equity by John V. Jack against Isaac N. Walker, auditor, and Charles E. Eulass, treasurer, of Warren county, Ohio, to enjoin them from levying and collecting taxes on certain credits owned by complainant, who is a nonresident of the state. The circuit court entered a decree according to the prayer of the bill (79 Fed. 138), and the defendants have appealed.

George A. Burr, for appellants.

Thomas B. Paxton and W. F. Eltzroth, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. This is an appeal from a decree enjoining the taxing officers of Warren county, Ohio, from levying and collect-

[1] See note at end of case.

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ing taxes on certain moneys and credits, evidenced by promissory notes and secured by mortgage upon land in that county, which are owned by John V. Jack, the complainant below, a nonresident of Ohio and a citizen of the state of New York. The answer admitted all the averments of the bill as to the ownership of the moneys and credits, the residence of Jack, and the intention of the defendants to levy and collect the taxes unless enjoined, but averred that the moneys and credits during the years for which the taxes were to be collected were invested, loaned, and controlled by one George W. Carey, "who was during all of said years the agent of the complainant in so investing, loaning, and controlling said moneys and credits, and was during all of said years a resident of the said county of Warren, and state of Ohio"; "that said moneys and credits should have been listed in said county of Warren for taxation therein, by the said George W. Carey, as such agent of complainant, in each and all of the aforesaid years, but that neither the said George W. Carey nor any one listed said moneys and credits for taxation in said county in and for any of said years." The complainant excepted to the answer for insufficiency; the court sustained the exception; and, the defendants declining to plead further, the court entered a decree perpetually enjoining the defendants as prayed in the bill. The court seems to have treated the exception as if equivalent to a demurrer testing the sufficiency of the averments of the answer as a defense to the bill upon its merits. This was not according to proper equity practice. There is no such thing as a demurrer to an answer in equity. Grether v. Cornell's Ex'rs, 43 U. S. App. 770, 23 C. C. A. 498, and 75 Fed. 742. The only way by which the sufficiency of an answer on its merits as a defense to the case made in bill can be tested is by setting the case for hearing on bill and answer. The office of an exception is to raise the question whether the averments and denials of the answer are sufficiently responsive to the allegations of the bill. In this case the averments of the answer were in every way responsive to the allegations of the bill, and left nothing to be desired in defining the sharpness of the real issue between the parties. It was therefore an error to sustain the exceptions. We might be content to reverse the cause on this ground; but in order to shorten the further proceedings for which the case must be remanded, and because the parties have argued the case on its merits as presented by bill and answer, we proceed to consider it in that aspect.

The question is whether, by the laws of Ohio, the moneys and credits of a nonresident of Ohio are subject to taxation under the laws of that state, when such moneys or credits have been invested, loaned, and are under the control of the owner's agent resident in Ohio. Counsel for complainant below contend that such moneys and credits are not taxable in Ohio for two reasons: First, because they are not within the jurisdiction of the state, and the state has no power to tax them; and, second, because the statutes of Ohio, properly construed, do not provide for their taxation.

The general rule for determining the situs of personal property is that it follows the person of the owner, and has its situs at his residence. With respect to tangible personal property, however, it is

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well settled that it may be taxed by the sovereignty having jurisdiction over the place which is its actual situs, though the owner live in another jurisdiction. Intangible personal property, however, like choses in action and credits, can, as a general rule, only be taxed at the residence of the owner. State Tax on Foreign-Held Bonds, 15 Wall. 300; Kirtland v. Hotchkiss, 100 U. S. 498. The language of the former of these cases has been modified somewhat in Savings & Loan Soc. v. Multnomah Co., 169 U. S. 421, 428, 18 Sup. Ct. 392, where it was held to be within the power of a state to tax the interest of a nonresident mortgagee in the mortgaged property. But the earlier case is still authority for the general rule that a credit is taxable only at the residence of the creditor. Certain exceptions to this rule are recognized. One is where the chose in action is represented by a negotiable bond, property in which passes by delivery. In such a case the evidence of title is in such form, and is so important an element of the value of what it represents as to make it closely analogous to tangible property, and to give it a situs for taxation where the negotiable evidence of its existence actually is, even though the owner may live elsewhere. This exception is commented on by Mr. Justice Field in delivering the opinion of the court in the case of State Tax on Foreign-held Bonds. Another exception is where, though the beneficial interest in the debt is owned by a nonresident, yet the money is invested, the debt is contracted, and the investment is controlled, by a resident agent of the owner. In such a case it is held that the money and the credit in which it is invested are within the state, where the agent receives the money for his principal, and makes the loan, having authority to collect it and to reinvest it. Finch v. York Co., 19 Neb. 50, 26 N. W. 589; Billinghurst v. Spink Co., 5 S. D. 84, 58 N. W. 272; In re Jefferson, 35 Minn. 215, 28 N. W. 256; Redmond v. Commissioners, 87 N. C. 122; People v. Trustees of Village of Ogdensburg, 48 N. Y. 390; Catlin v. Hull, 21 Vt. 152; People v. Smith, 88 N. Y. 576; Hutchinson v. Board, 66 Iowa, 35, 23 N. W. 249; People v. Davis, 112 Ill. 272; People v. Insurance Co., 29 Cal. 534; Herron v. Keeran, 59 Ind. 472. In such cases the circumstance that the agent has in his possession the evidence of the indebtedness is regarded as of importance. The authorities above cited leave no doubt of the power of the state of Ohio to tax any moneys and credits owned by nonresidents, the custody of which has really been intrusted by their owners to resident agents.

The next question is whether the law of Ohio taxes such moneys and credits.

Section 2731, Rev. St. Ohio, is as follows:

"All property, whether real or personal, in this state, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks or otherwise, of persons residing in this state, shall be subject to taxation, except only such as may be expressly exempted therefrom; and such property, moneys, credits and investments shall be entered on the list of taxable property, as prescribed in this title."

Section 2734, Rev. St. Ohio, is as follows:

"Every person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession, all moneys invested, loaned or otherwise controlled by him, as agent or attorney, or on account of

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any other person or persons, company or corporation whatsoever, and all moneys deposited subject to his order, check or draft, and all credits due or owing from any person or persons, body corporate or politic, whether in or out of such county."

Section 2735, Rev. St. Ohio, is as follows:

"Every person required to list property on behalf of others shall list the same in the same township, city or village in which he would be required to list it if such property were his own, but he shall list it separately from his own, specifying in each case the name of the person, estate, company or corporation to whom it belongs."

Section 2731 provides for the taxation of all real and all tangible personal property within the state. It also provides for the taxation of all intangible personal property belonging to residents of the state. If this section stood alone, it cannot be doubted that intangible personal property belonging to nonresidents would escape taxation. Section 2734, however, requires every person of full age and sound mind to list all moneys invested, loaned, or otherwise controlled by him as agent or attorney, or on account of any other person or persons, company or corporation. It is forcibly argued that the first section above quoted defines what is intended to be taxed, and the other two only contain directions as to the persons who shall list the property described in the first section, and do not enlarge the scope of the first section at all. Hence it is said the moneys and credits to be listed by agent or attorney are those owned by residents of the state who are absent temporarily or are for any reason prevented from listing them themselves. Support is given to this argument by the arrangement of the sections in the Revised Statutes, and in the acts in which they first appear as laws. More than this, the state circuit court for the Fifth Ohio circuit, in the case of Lee v. Dawson, 8 Ohio Cir. Ct. R. 365, has so construed the sections, and has held expressly that a nonresident of Ohio is not required to pay taxes on his intangible property for taxation, notwithstanding it is under the control of a resident agent for investment and collection. We are unable, however, to follow this decision, because we are not able to reconcile it with the decisions of the supreme court of Ohio.

In Grant v. Jones, 39 Ohio St. 506, the supreme court of Ohio declared, in the syllabus of the case (which is always drawn by the court), that "credits owned by a nonresident of this state are not taxable here, unless they are held within this state by a guardian, trustee, or agent of the owner, by whom they must be returned for taxation." It is true that this decision was made under the tax law of 1859, and its amendments (2 Swan & C. p. 1438), which were then in force; but they were not substantially different from the provisions of the Revised Statutes in this regard. Judge Johnson, in delivering the opinion of the court, referred to the holding of the supreme court of the United States, in the case of State Tax on Foreign-Held Bonds, that a debt was taxable only at the residence of the creditor, and then continued:

"Our statute clearly adopts that rule. Whenever the person holding such choses in action resides in Ohio, he must list for taxation such credits, whether he holds them as owner, guardian, trustee, or agent. If they are held within the state in either capacity, they are within the jurisdiction of the state for

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purposes of taxation. If they are not so held, but are owned and held by a nonresident, they are not subject to taxation."

The case before the court was that of the attempted taxation of an itinerant peddler, a nonresident of Ohio, who owned notes secured by mortgages on land in Butler county, Ohio, who visited that county each year to collect interest and so much of the principal as was due, brought the notes and mortgages with him into the state, and took them away with him when he left it. It was held that the notes were not subject to taxation, because he had no resident agent to hold the notes for him. The court might have disposed of the case without deciding that, if a resident agent had made the investment and held the notes, they would have been taxable, and to that extent the language of the syllabus and the opinion above quoted were obiter dictum. The syllabus in Ohio decisions, however, is the language of the court, and is to be given more weight than the language of a single judge in delivering the judgment of the court. In any event, upon a doubtful construction of a state statute, such an expression of opinion by the highest court of the state is, and must be, very persuasive in this court.

In Myers v. Seaberger, 45 Ohio St. 232, 12 N. E. 796, the point in judgment was whether a nonresident of Ohio was subject to taxation upon notes secured by mortgage on Ohio land, because the notes were in the hands of a resident agent for collection, but not for reinvestment. It was held that the money invested in the notes was not money "invested, loaned, or otherwise controlled by him as agent or attorney, or on account of any other person or persons." Construing section 2731, the court said:

"The first clause evidently embraces all tangible property, real or personal, situated in this state, irrespective of the residence of the owner; and the second clause embraces all intangible property of persons residing in this state, irrespective of where the subject of the property may be situated. So that it seems clear that the credits of persons not residing in this state are not the subjects of taxation by its authorities, though the debtor may reside here. Such has been the uniform policy of this state. * * * The rule as above stated is qualified as to 'money' by section 2734, Rev. St. By this section every person of full age and sound mind is required to list for taxation 'all moneys invested, loaned or otherwise controlled by him as agent or attorney, or on account of any other person or persons.' But the case before us does not come within this provision. The agent of the defendant had no power to loan or invest money for her in this state. His duties were confined to the collection of that which had been loaned, and transmitting it to his principal as fast as it was collected. The phrase 'or otherwise controlled by him' must be construed to mean, in a manner similar to the loaning and investing of money. * * * To loan or invest money is one thing; to collect and transmit it to the owner when collected is another and different thing. Any other construction would require every attorney in the state engaged in making collections for nonresidents to return the same for taxation. Such could not have been the intention of the legislature, nor does the language of the statute require that such construction should be placed on it."

It may properly be said that the court might have decided this case by assuming, without deciding, that the language of section 2734 applied to the money and credits of nonresidents, and by then holding that the case before it was not within the exception created by that section. The court, however, held that section did apply to mon-

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eys of nonresidents, but that the case in hand did not come within its application. It may be questioned whether the construction by the court of the section under these circumstances could be regarded as obiter; but, however that may be, we regard it as sufficiently authoritative to require us to follow the decision. With deference, we think that the opinion of the state circuit court did not give sufficient weight to the language of the supreme court of the state in Grant v. Jones or in Myers v. Seaberger.

The case must go back to the circuit court in order that, if the complainant wishes, he may be permitted to file a replication, and try the issue upon the facts whether the moneys invested for the complainant below were "invested, loaned or otherwise controlled by" Carey, as complainant's agent, within the meaning of section 2734. The order will be that the decree of the circuit court is reversed at appellee's costs, with directions to overrule the exceptions to the answer, and to take further proceedings not inconsistent with this opinion.

NOTE.

Taxation of Intangible Property of Nonresidents.

1. Place of Taxation of Intangible Property.
2. Situs of Mortgages for Purposes of Taxation.
3. Case of "State Tax on Foreign-Held Bonds."
4. Taxation of Mortgages Held by Nonresidents.
5. Same; Mortgages in Hands of Local Agents.
6. Mortgages on Lands Out of the State.
7. Taxation of Mortgagee's Interest; Payment of Tax by Mortgagor.
8. Same; Statutory Provisions in Michigan.
9. Same; Constitutional Provision in California.
10. Corporate Bonds and Stocks.

1. Place of Taxation of Intangible Property.

While personal property of a tangible nature and having an intrinsic value is taxable where found, it is an accepted principle of the law of taxation that intangible personal property, such as credits, claims, and other choses in action, follows the person of the owner, and can have no local habitation other than his. Consequently, in the absence of any statute establishing a different rule, the situs of all such intangible personal property, for purposes of taxation, is at the domicile of its owner and nowhere else. Case of State Tax on Foreign-Held Bonds, 15 Wall. 300; Grundy Co. v. Tennessee Coal, Iron & Railroad Co., 94 Tenn. 295, 29 S. W. 116; Worthington v. Sebastian, 25 Ohio St. 1; Barber v. Farr, 54 Iowa, 57, 6 N. W. 134. For instance, where a resident of Iowa had deposited for safe-keeping in Illinois certain promissory notes owned by him, although they had never been brought by him into Iowa, it was held that they were subject to taxation in the latter state; for the notes in such case are merely the evidence of the debts or rights represented, and these follow the person of the owner. Hunter v. Supervisors, 33 Iowa, 376.

2. Situs of Mortgages for Purposes of Taxation.

When we inquire what is the proper situs of a mortgage for the purposes of taxation, four possible answers suggest themselves: First, the jurisdiction in which the land lies on which the mortgage rests; second, the district in which the mortgage itself, with its accompanying evidences of the debt, is physically present; third, the place where the mortgage is recorded; fourth, the place of the domicile of the owner of the mortgage. As to the first of these solutions of the question, it is to be remarked that the imposition of a tax upon the holder of a mortgage, in respect to such mortgage, is not a taxing of the land on which the debt is secured. The situation of the

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land is immaterial. Even though it may lie in another state, yet, as will be shown in a subsequent section, this does not prevent the taxation of the mortgage if the holder thereof is within the jurisdiction. It follows, therefore, that a mortgage is not assessable for taxation in the district where the realty is situated, unless that is also the place of residence of the mortgagee. Latrobe v. Mayor, etc., 19 Md. 13. But see State v. Runyon, 41 N. J. Law, 98. It should be remarked, however, that it is competent for a state, by statute, to provide that real-estate mortgages, for the purposes of taxation, shall be deemed interests in realty, with the necessary consequence that the interest of the mortgagee is taxable where the land lies. This has been done in Michigan. See Common Council v. Board of Assessors, 91 Mich. 78, 51 N. W. 787.

In the second place, it must be obvious that the tax is not imposed upon the pieces of paper or parchment on which the mortgage and notes or bonds are inscribed. These evidence the right of the creditor to receive the amount of his loan at its maturity, but do not constitute the property upon which he is to be taxed. They have no intrinsic or conventional value, apart from the debt secured, and therefore can have no situs of their own.

In the third place, if the physical presence of the mortgage itself is of no importance in determining the situs of the debt for purposes of taxation, it is evident that still less weight can be attached to the fact that it is recorded in a particular jurisdiction. The record of a mortgage, being only a copy of the original, is clearly not taxable as personal property. Latrobe v. Mayor, etc., 19 Md. 13; Gallatin Co. v. Beattie, 3 Mont. 173. (But in Oregon it is said that it is competent for the legislature to provide that a mortgage shall be taxed in the county where it is recorded. Crawford v. Linn Co., 11 Or. 482, 5 Pac. 738.)

By the process of elimination, therefore, we reach the conclusion that the only proper situs of a mortgage for taxation is the place of the domicile of the owner. That this is the true doctrine is attested by the concurrent voice of a multitude of authorities, most of which will be found cited in the succeeding sections of this note. In truth, a mortgage, merely as such, is not a subject of assessment for taxation. The assessment is made, and the tax imposed, upon the debt which the mortgage was given to secure, and the debt can have no situs for the purposes of taxation apart from the residence of the owner. People v. Eastman, 25 Cal. 601; People v. Whartenby, 38 Cal. 461. In one of the early cases in Nevada, it was correctly pointed out that a tax on "money at interest secured by mortgage" is not a tax on the coin or notes in which the mortgage debt may be paid or in which it was made; nor is it a tax on the land covered by the mortgage; neither is it a tax on the documents by which the transaction is evidenced. It is a tax on a chose in action; that is, on the right of the creditor to receive or collect a certain sum of money. State v. Earl, 1 Nev. 394. And again, in a case in Wisconsin it was said: "Such notes and mortgages are mere evidences of indebtedness. The destruction of such evidences does not necessarily extinguish the debts. They are merely choses or things in action. Such mere credits have no other situs than the domicile of the owner, unless made so by statute. As observed by counsel for the village, in the case of such intangible species of property the thing that is valuable is the right of the creditor to receive property or money, and to enforce such right by action in court." State v. Gaylord, 73 Wis. 316, 41 N. W. 521.

3. Case of "State Tax on Foreign-Held Bonds."

In this leading case in the United States supreme court it was held that bonds issued by a railroad company are property in the hands of the holders; and when they are held by nonresidents of the state in which the company was incorporated, they are property which is beyond the jurisdiction of that state. Consequently it was decided that a law of the state which required the treasurer of a company incorporated and doing business in that state to retain 5 per cent. of the interest due on the bonds of the company, by way of a state tax, when the bonds were made and payable out of the state to nonresidents of the state, being citizens of other states, and held by them, was not a legitimate exercise of the taxing power of the state; it was

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a law which interfered between the company and the bondholder, and, under the pretense of levying a tax, impaired the obligation of the contract between the parties. In the course of the opinion it was said: "It is undoubtedly true that the actual situs of personal property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the state in which it may be taxed. The same thing is true of public securities consisting of state bonds and bonds of municipal bodies, and circulating notes of banking institutions; the former by general usage have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages, and debts generally, has no situs independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners." State Tax on Foreign-Held Bonds, 15 Wall. 300, 323. In accordance with the principles of this decision, it is held that, while such intangible personal property as is referred to is not taxable when belonging to a nonresident, yet such securities and bonds as are operated in the market, and have thus acquired a domicile and situs within the state, and also money on deposit in banks, are subject to the taxing power at the place where found. State v. Board of Assessors, 47 La. Ann. 1544, 18 South. 519; Parker v. Strauss, 49 La. Ann. 1173, 22 South. 329.

4. *Taxation of Mortgages Held by Nonresidents.*

Under the influence of the leading case above cited, and in accordance with its doctrines, it is now held in nearly all the states that mortgages, considered with reference to taxation, are choses in action, are attached to the person of the holder, have no situs independent of the domicile of such holder, and are not taxable save at the place of such domicile. Consequently a debt secured by mortgage which is payable to and held by a nonresident of the state is not subject to be taxed by the state or its municipalities, although the land upon which the incumbrance of the mortgage rests is within the jurisdiction of the taxing power. The situation of the mortgaged land within the limits of the state is not the determining factor. The thing to be taxed is the debt secured, considered as available to the creditor and as a part of his assets; and this follows the person of the creditor, and if he is domiciled without the limits of the state, the debt is beyond the reach of its revenue laws. See Board of Com'rs v. Cutter, 3 Colo. 349; Goldgart v. People, 106 Ill. 25; Foresman v. Byrns, 68 Ind. 247; Senour v. Ruth, 140 Ind. 318, 39 N. E. 946; City of Davenport v. Mississippi & M. R. Co., 12 Iowa, 539; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 44 La. Ann. 760, 11 South. 91; Railey v. Board, 44 La. Ann. 765, 11 South. 93; Barber Asphalt Pav. Co. v. City of New Orleans, 41 La. Ann. 1015, 6 South. 794; Meyer v. Pleasant, 41 La. Ann. 645, 6 South. 258; City of St. Paul v. Merritt, 7 Minn. 258 (Gil. 198); Holland v. Commissioners, 15 Mont. 460, 39 Pac. 575; State v. Earl, 1 Nev. 394; Dolman v. Cook, 14 N. J. Eq. 56; Keeney v. Atwood, 16 N. J. Eq. 35; Grant v. Jones, 39 Ohio St. 506; Myers v. Seaberger, 45 Ohio St. 232, 12 N. E. 796; Territory v. Delinquent Tax-List (Ariz.) 24 Pac. 182. For the same reason a state or county has no power to levy a tax upon a judgment rendered within the state but belonging to a nonresident; and this rule remains the same although the judgment was for the foreclosure of a mortgage on land within that county. A judgment, for the purposes of taxation, has no situs distinct and apart from the domicile of its owner. Dykes v. Mortgage Co., 2 Kan. App. 217, 43 Pac. 268; Commissioners v. Leonard, 57 Kan. 531, 46 Pac. 960. But, to be thus exempt from taxation, it is of course necessary that the nonresident should be the actual and beneficial owner of the security. If a resident owner of a note and mortgage has transferred the same, by assignment and delivery, to a nonresident, but only as collateral security, the original payee is still the owner of the securities, subject to a contingency, and is properly chargeable with taxes thereon. Gibbins v. Adamson, 5 Kan. App. 90, 48 Pac. 871. Nor will persons subject to the taxing power of the state be allowed to use

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this legal doctrine as a means of evading the revenue laws and defrauding the state. In a case in New York, it appeared that a resident owner of bonds and mortgages, constituting the bulk of his estate, assigned them, without consideration, before the 1st of July, on which day his taxable status became fixed, to one of his children who was a nonresident. The assignment was recorded after the 1st of July, and the assignor retained possession of the securities and received the interest on them. It was held that the assessment of such bonds and mortgages as the property of the assignor was proper. People v. Sawyer (Sup.) 27 N. Y. Supp. 202.

In some few of the states, notwithstanding this general consensus of opinion, laws have been enacted providing for the taxation of mortgages held by nonresident creditors, and the courts have sustained their validity. In Oregon, it has been laid down that a state has power to tax a mortgage as such in the county where it is recorded, or where the land lies, irrespective of the residence of the owner of the mortgage. Mumford v. Sewall, 11 Or. 67, 4 Pac. 585; Ankeny v. Multnomah Co., 3 Or. 386. The federal courts in Oregon follow this ruling of the state supreme court. See Dundee Mortg. Trust Inv. Co. v. School Dist. No. 1, 19 Fed. 359; Savings & Loan Soc. v. Multnomah Co., 60 Fed. 31. And the supreme court of the United States has affirmed the validity of the Oregon law, so far as to hold that the rule of taxation thereby introduced does not violate any rights of citizens of other states secured to them by the constitution of the United States. Id., 169 U. S. 421, 18 Sup. Ct. 392; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 17 Sup. Ct. 604. In the case of Mumford v. Sewall, supra, it was attempted to distinguish the case of State Tax on Foreign-Held Bonds, 15 Wall. 300, on the ground that the tax laid by the statute in question was not upon the debt secured by the mortgage, but upon the mortgage as a security. It was said that, conceding that the debt followed the person of the owner, and, in case of a nonresident, would be without the jurisdiction of the state, yet the mortgage, considered as a security, was local and within the jurisdiction. The sophistry of this reasoning is very apparent when we reflect that, on the concession here made by the court, the state where the creditor resides may tax him upon the debt secured by the mortgage, and thus he would be liable to double taxation for the same item of property, once in his own state on the debt, and once in Oregon on the instrument which evidences and secures it. If further refutation is needed, it is sufficient to point out that a security, divorced from the debt which it secures, is a phantom, and can have no taxable value.

With a much better show of reason the supreme court of Michigan has held that a mortgage on land so far partakes of the character of realty that it is competent for the legislature to provide that the mortgage of a nonresident mortgagee shall be taxable where the land is situated. Common Council of City of Detroit v. Board of Assessors, 91 Mich. 78, 51 N. W. 787. In this case it was said: "It is urged that the law is unconstitutional, in so far as it attempts to tax mortgages owned by nonresidents, for the reason that the mortgage is personal property and a mere security for a debt, and is of that character of personalty which must be held to attach to the person, and to have no other situs for any purpose; and the case of State Tax on Foreign-Held Bonds, 15 Wall. 300, is cited in support of this contention. It is further said in support of that position that in Michigan a mortgage is a mere incident to the debt, and conveys no title to the land. Caruthers v. Humphrey, 12 Mich. 270; Ladue v. Railroad Co., 13 Mich. 380; Wagar v. Stone, 36 Mich. 364. And it is urged that, as this is so, the taxation of such mortgage interest amounts to a taxation of the debt, and brings the case within the case of State Tax on Foreign-Held Bonds. But, while it is true that the mortgage is a mere security for the debt, yet it conveys a qualified property in the land. While it is not an estate which entitles the mortgagee to possession before foreclosure, it is nevertheless an estate or interest in lands which is protected by our registration laws as fully as any other title or interest. It is held that the mortgage interest so far partakes of the character of real property as to require administration in the state of its location, and that neither a foreign administrator nor his assignee can maintain an action to foreclose a mortgage in the state where

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the mortgaged property is situated. Cutter v. Davenport, 1 Pick. 81; Dial v. Gary, 14 S. C. 573; and the opinion of Cooley, J., in Reynolds v. McMullen, 55 Mich. 568, 22 N. W. 41. It has also been held that the legislature may select as the situs of the taxation of mortgages either the political division where the owner resides or that in which the mortgaged premises are situated. State v. Runyon, 41 N. J. Law, 105; Mumford v. Sewall, 11 Or. 70, 4 Pac. 585. See, also, Firemen's Fire Ins. Co. v. Com., 137 Mass. 81; Providence Inst. for Savings v. City of Boston, 101 Mass. 575. The case of State Tax on Foreign-Held Bonds is apparently in conflict with these cases. The doctrine of that case was announced by a bare majority of the court, and ought not to be treated as binding authority, except as to the precise questions before the court. The law which the court had under consideration provided 'that the president, treasurer, or cashier of every company, except bank or savings institutions, incorporated under the laws of this commonwealth, doing business in this state, which pays interest to its bondholders or other creditors, shall, before the payment of the same, retain from said bondholders or creditors a tax of five per centum of the interest upon every dollar paid as aforesaid.' In the opinion of the majority of the court, Mr. Justice Field states the question before the court as follows: 'The question presented in this case for our determination is whether the eleventh section of the act of Pennsylvania of May, 1868, so far as it applies to the interest on the bonds of the railroad company made and payable out of the state, issued to and held by nonresidents of the state, citizens of other states, is a valid and constitutional exercise of the taxing power of the state, or whether it is an interference, under the name of a tax, with the obligation of a contract between the nonresident bondholders and the corporation.' It will be seen that the court was not dealing with a statute which in terms imposed a tax upon a mortgage interest in lands. This statute was a clear attempt to tax credits distinctively as such, and applied alike to mortgages secured by bonds and to those which were not so secured. In that respect it is distinguishable from the statute of Michigan, as our statute, in all its provisions relating to the subject, imposes a tax upon an interest in real estate as such. It seems to me that the case is not given any added force as authority here by the fact that the particular bonds in question were secured by mortgage, for the attempt was not to tax the mortgage interest in lands, but to impose a tax upon the bond itself, which the court held to have a situs at the domicile of its owner. So, in Latrobe v. Mayor, etc., 19 Md. 20, it was held that the situs of the mortgage was the domicile of the owner, and that such owner could not be taxed where the property covered by it was located. But in the opinion it is said: 'We are not aware that the action of the assembly regulating the imposition and collection of taxes has effected any modification of the rules of law which otherwise must govern the determination of this question.' So it will be seen that the question of the power of the legislature to fix the situs for the purposes of taxation has been determined, and that, even though held by nonresidents, they may be given a situs in the place where the mortgaged property is situated. This the act in question purports to do, and it should be sustained." But aside from its opposition to the great weight of authority, this ruling is unsatisfactory by reason of its failure clearly to discern what is the really valuable possession of a creditor secured by mortgage. It is not his defeasible title to, or interest in, the land. That is held only for the purpose of making sure the payment of the debt, and apart from the debt it has no value. Moreover, it is terminable upon payment of the obligation. Taxation is laid only upon things of value; and that which alone is valuable to the mortgage creditor is his right to claim and receive payment of the mortgage debt. That right is personalty, and, upon well-settled principles of law, it follows the person of the owner and has no situs save at the place of his domicile.

In Massachusetts, under the statutes of that state, it is held that bonds secured by mortgage to trustees represent a loan on mortgage of real estate, and are taxable to the trustees as real estate, and not to the bondholders as personal property. Knight v. City of Boston, 159 Mass. 551, 35 N. E. 86.

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5. Same; Mortgages in Hands of Local Agents.

Although most of the states, as already remarked, have acceded to the rule that a mortgage debt is taxable only at the place of the owner's domicile, yet in many it is held that notwithstanding that mortgage securities may be the property of a person who is not a resident of the state, yet if the securities are in fact within the state, being in the hands of an agent, attorney, trustee, or guardian of the owner, for renewal or collection, with a view of reloaning the money by the agent, not under specific directions from the principal, but as a more or less permanent business, then the maxim that movable things follow the person does not apply, and the situs of the property, for the purpose of taxation, becomes fixed within the state, and the mortgage securities subject to its revenue laws. Goldgart v. People, 106 Ill. 25; Supervisors v. Davenport, 40 Ill. 197; People v. Davis, 112 Ill. 272; Foresman v. Byrns, 68 Ind. 247; Finch v. York Co., 19 Neb. 50, 26 N. W. 589; People v. Smith, 88 N. Y. 576; Redmond v. Commissioners, 87 N. C. 122; Grant v. Jones, 39 Ohio St. 506; Poppleton v. Yamhill Co., 18 Or. 377, 23 Pac. 253; People v. Trustees of Ogdensburgh, 48 N. Y. 390; Hunt v. Perry, 165 Mass. 287, 43 N. E. 103; City of Detroit v. Lewis, 109 Mich. 155, 66 N. W. 958; Washington Co. v. Jefferson's Estate, 35 Minn. 215, 28 N. W. 256; Hutchinson v. Board, 66 Iowa, 35, 23 N. W. 249; Wilcox v. Ellis, 14 Kan. 588; People v. Home Ins. Co., 29 Cal. 533. In a recent case in Indiana, the court said: "We are of opinion that a business may be done in buying and selling property, including bonds, stocks, notes, and mortgages, and in making loans and investments, collecting and reloaning from year to year; and that if the moneys and securities so used are retained in this state [by the owner or by a local agent] they should be subject to taxation here, quite the same as any other kind of property." Buck v. Miller, 147 Ind. 586, 45 N. E. 647, and 47 N. E. 8. So, in South Dakota, it is said that a nonresident who sends money into the state and surrenders its possession and control to agents fully authorized to loan, invest, and manage the same, thereby subjects such property to the jurisdiction of the state for the purpose of taxation; and the legal fiction that the situs of such property is at the domicile of the owner yields to the requirements of justice, and the actual situs is the place where the property is actually situated and employed in business, and where such agents reside. Billinghurst v. Spink Co., 5 S. D. 84, 58 N. W. 272. And in a case in Vermont, where the question was as to the taxation of certain debts due from residents of the state to a nonresident creditor, and the property was in the hands of a resident agent, who was authorized to control and manage the funds, and collect and reinvest, and who was paid a fixed salary for his services, it was held that the property was taxable to the agent, as agent, under a statute providing for the taxation of property "held in trust" by residents of the state. Catlin v. Hull, 21 Vt. 152.

This rule, however, is not quite universally accepted. It appears to be denied in Alabama. See Boyd v. City of Selma, 96 Ala. 144, 11 South. 393. And an inferior court in the state of Ohio has held that a nonresident of that state is not required to list his intangible property for taxation, notwithstanding it is under the control of a resident agent for investment and collection; and the fact that promissory notes are jointly owned by three persons, one of whom is not a resident of Ohio, does not make the interest of the nonresident subject to taxation in that state, although it appears that, under the general directions of such nonresident owner, the resident joint owner manages the fund evidenced by the notes. Lee v. Dawson, 8 Ohio Cir. Ct. R. 365.

But at any rate it is quite clear that, in order that the property of nonresidents should thus become amenable to the revenue laws of the state, it is necessary that the resident agent should have an actual and effective control over it. If the securities are merely in his hands for the purpose of collecting the principal and interest and remitting the same to his employer (Myers v. Seaberger, 45 Ohio St. 232, 12 N. E. 796), or if the agent does not occupy the position of a trustee, clothed with discretion and choice as to the investments to be made, but acts merely under the specific direc-

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tions of the nonresident owner of the property, the state does not acquire any jurisdiction for purposes of taxation. Boardman v. Supervisors, 85 N. Y. 359. On the same principle, promissory notes and other choses in action placed in the hands of an attorney within the state simply for collection, and municipal bonds placed temporarily on deposit in a bank in the state merely for safe-keeping, and belonging to a bona fide resident of another state, are not subject to taxation. Herron v. Keeran, 59 Ind. 472.

6. Mortgages on Lands Out of the State.

From the principle that a mortgage debt is personal property and has no other situs for the purpose of taxation than the place of its owner's domicile we have deduced the rule that a state has no power to impose taxes upon mortgages payable to and held by nonresidents, although the land incumbered may lie within its own borders. The converse of this rule must be equally true. In such a case, where the creditor resides in one state and the mortgaged lands lie in another, the right of taxing the security must belong to the former state. Since a debt, for the purposes of taxation, is situated at the domicile of the creditor, although it is secured by mortgage upon real estate lying in another state, it is competent for a state to tax one of its resident citizens upon a debt due to him from a citizen of another state, which is evidenced by the bond of the debtor secured by mortgage upon real estate situated in the state in which the debtor resides. Kirtland v. Hotchkiss, 100 U. S. 491; Id., 42 Conn. 426; State v. Darcy, 51 N. J. Law, 140, 16 Atl. 160; Bullock v. Guilford, 59 Vt. 516, 9 Atl. 360. Compare Fisher v. Commissioners, 19 Kan. 414. As the situation of the land incumbered is immaterial, in this respect, so also it makes no difference whether or not the mortgage securities are physically present in the taxing state, provided they are still within the control of the creditor, or in the possession of a mere agent, as distinguished from an assignee. Bullock v. Guilford, 59 Vt. 516, 9 Atl. 360. In this case, the decision in Catlin v. Hull, 21 Vt. 152, was distinguished. The latter case held that property of a nonresident owner in the hands of a resident agent, who was authorized to control and manage the funds, and had a discretion as to the investments, and who was compensated for his services by a salary, was taxable to the agent, as agent, and not to the owner. This ruling was distinguished on the ground that, in the earlier case, the property was held "in trust" by the agent, and "in such a case it may well be claimed that the trustee becomes a quasi owner of the debt." Herein also the court said: "It is doubtful, in our view, whether the place of keeping the evidence of a debt can in any way affect the situs of the debt." But see Fisher v. Commissioners, 19 Kan. 414, for a suggestion that the physical presence of the mortgage and notes may be an important consideration.

If, however, the resident owner has placed his funds and his mortgage securities in the hands of a trustee or agent in another state, giving the latter general authority to make, change, renew, and control the investments, then it seems that such securities should be withdrawn from the taxing power of the state where the owner resides. In the preceding section we saw that the authorities generally agree that, in this condition of affairs, it is competent for the state which has jurisdiction of the person of the agent or trustee to impose taxation on the investments so controlled by him; and if so, it should follow that the power of taxing them is withdrawn from the state wherein the owner resides. See cases cited in the preceding section. But compare State v. Gaylord, 73 Wis. 316, 41 N. W. 521.

7. Taxation of Mortgagee's Interest; Payment of Tax by Mortgagor.

Where a tax is imposed by law upon the mortgage debt, or upon the mortgagee's interest as such, for which the mortgagee is primarily made liable, it is his duty to pay the tax, and he cannot recover the amount so paid by him from the mortgagor or add the same to the mortgage debt. Pond v. Causdell, 23 N. J. Eq. 181. If, in such circumstances, the mortgagee neglects to pay the tax and the mortgagor pays it, the latter will be entitled to deduct the amount so paid from the mortgage debt or from accrued and ac-

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cruing interest thereon. Hay v. Hill, 65 Cal. 383, 4 Pac. 378; Hamill v. Littner (Cal.) 7 Pac. 707; Keeney v. Attwood, 16 N. J. Eq. 35. A statute of California (Pol. Code, § 3627) gives the owner of the property the privilege of deducting the amount of the taxes paid on the mortgagee's interest from the mortgage debt. But it is held that this is permissive only, and not mandatory; and it does not prohibit an action by the mortgagor to recover the same. San Gabriel Valley Land & Water Co. v. Witmer Bros. Co., 96 Cal. 623, 29 Pac. 500. The rule is the same where the statute imposing taxation on mortgage debts makes the mortgaged premises liable therefor. It is still the duty of the mortgagee, and not of the mortgagor, to pay the tax; the tax is the debt of the former and not of the latter. But since the tax is made a lien on the land for the purpose of securing its payment, the mortgagor will have the right to pay it, as a means of relieving his property from incumbrance; and if he does, he has the right to deduct the amount so paid from his indebtedness to the mortgagee. Blythe v. Luning, 14 Fed. 281, 7 Sawy. 504. It is also held that an erroneous assessment of a tax on a mortgage which has been already satisfied is not void, but in such case the tax on the mortgagee's interest is valid only against the land, not against the mortgagee personally, and it is payable by the owner of the land, whose estate has been enlarged by the release of the mortgage lien. McCoppin v. McCartney, 60 Cal. 367.

In the states where taxation is laid upon mortgage debts, it is now quite common for mortgages to contain a stipulation whereby the mortgagor binds himself to pay not only the taxes assessed upon the land itself, or his estate therein, but also such as may be levied on the mortgage debt or the interest of the mortgagee. Such an agreement, unless expressly forbidden by law, is perfectly valid and binding. Although the mortgage may provide for the payment of interest on the debt secured at the highest rate allowed by law, the insertion of such an agreement does not render the instrument obnoxious to the laws against usury. Common Council of City of Detroit v. Board of Assessors, 91 Mich. 78, 51 N. W. 787; Banks v. McClellan, 24 Md. 62; Pub. Gen. Laws Md. art. 66, § 5. In Massachusetts, the statute declares that mortgagors and mortgagees are to be deemed, for the purposes of taxation, joint owners so long as the mortgagors remain in possession, and the assessor is required to assess upon the land the amount of the mortgagee's interest, and also the amount of the mortgagor's interest after deducting the assessed value of the interest of the mortgagee; and all the taxes thus assessed are a lien on the land. Under a condition in a mortgage that the mortgagor "shall pay all taxes and assessments on the granted premises," it is held that he is bound to pay the taxes assessed under this statute on the interest of the mortgagee. Hammond v. Lovell, 136 Mass. 184; Pub. St. Mass. c. 11, §§ 13–16.

8. Same; Statutory Provisions in Michigan.

In the state of Michigan, an act passed in 1891 declares that a real-estate mortgage or other obligation by which a debt is secured on land within the state shall be deemed an interest in the land for the purpose of taxation, and that the value of the property, less the value of the security, shall be assessed and taxed to the owner of the property, and the value of the security shall be assessed and taxed to the owner thereof; that the taxes shall be a lien on the property and security, and may be paid by either party to the security after waiting a certain time; that if paid by the mortgagor, the portion assessed to the mortgagee shall be treated as payment on interest due, or, if no interest is due, then as payment of so much of the principal; and that if the mortgagee shall neglect to pay the tax assessed to him, it shall be collected from the mortgagor, and if not collected shall be returned against the land in the same manner as other delinquent taxes. Laws Mich. 1891, Act No. 200, §§ 2, 15, 17. Many objections have been urged against the validity of this statute, but they have not prevailed. In a recent case before the supreme court of the state it was held, first, that the act was not open to the objection that it required the mortgagor to pay the mortgagee's tax, as the legislature might cause the entire value to be

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assessed to the mortgagor, and therefore the act, being in relief of him, could not be held invalid because it relieved him only on condition of payment by the mortgagee within a certain time. Secondly, it was held that the provision of the statute making the mortgagor liable for the tax assessed upon the interest of the mortgagee did not contravene the constitutional prohibition against laws impairing the obligation of contracts, since it would be competent to enact that the whole value of the land should be assessed to the mortgagor. Thirdly, it was held that the provision authorizing the mortgagor, upon paying the tax on the mortgagee's interest, to deduct the same from the amount due on the mortgage, did not impair the obligation of contracts, even though the deduction would be from principal not yet due; for it was merely the excusing of the mortgagor from paying the amount of the mortgage debt attached or seized by the state. Finally, it was held that where, at the time the act took effect, there were existing agreements on the part of mortgagors sufficiently broad to render them liable for the tax on the mortgagees' interests, they would not be affected by the act. Common Council of City of Detroit v. Board of Assessors, 91 Mich. 78, 51 N. W. 787.

9. Same; Constitutional Provision in California.

In California, probably from a feeling that agreements by mortgagors to pay the taxes assessed on the mortgage were wrung from the necessities of debtors by the greed of creditors, the people have seen fit to incorporate the following provision in their constitution: "Every contract hereafter made, by which a debtor is obligated to pay any tax or assessment on money loaned or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void." Const. Cal. art. 13, § 5. This clause, it will be observed, applies not only to mortgages strictly so called, but also to trust deeds intended as mortgages. Sanford v. Society, 80 Fed. 54. Under its prohibitions it is held that a provision in a mortgage that the mortgagee may include in the mortgage debt all taxes and assessments on the premises, "including taxes on the interest of the mortgagee therein by reason of the mortgage," renders the mortgage void as to the interest on the notes secured thereby; and the fact that the mortgagee did not attempt to make the mortgagor pay the tax on the mortgage directly and in the first instance is immaterial. Garms v. Jensen, 103 Cal. 374, 37 Pac. 337. But in a case like this, if the mortgagor voluntarily pays the interest (though the law would have prevented the recovery of it by the mortgagee) under a mistaken belief that he is bound to do so, he cannot recover it back or demand that it be credited on the principal of the loan. Harralson v. Barrett, 99 Cal. 607, 34 Pac. 342. An agreement with sureties, executed contemporaneously with a mortgage, binding the mortgagor to pay all the taxes assessed on the mortgage, although apparently inconsistent with a provision in the mortgage itself making it the duty of the mortgagee to pay such taxes, is unlawful and void under this clause of the constitution. Burbridge v. Lemmert, 99 Cal. 493, 32 Pac. 310. But on the other hand, where the mortgage provided that the mortgagee should pay the taxes on the mortgage debt, and the mortgagee signed a separate agreement to credit the mortgagor with 2½ per cent. interest on the mortgage note if the latter presented receipts showing that he had paid "all the taxes assessed against the property covered by the mortgage," it was held that this was not an agreement of the mortgagor to pay taxes on the money loaned, nor could parol evidence be given that such was the intention of the parties for the purpose of bringing the case within the prohibitory clause of the constitution. Hewitt v. Dean, 91 Cal. 5, 27 Pac. 423; Hewett v. Same (Cal.) 25 Pac. 753; Bank v. Webber, 110 Cal. 538, 42 Pac. 1066. Also it has been held (though by a divided court) that a contemporaneous parol promise by a mortgagor to pay the mortgage tax does not invalidate the stipulations for interest, under the constitution. Daw v. Niles, 104 Cal. 106, 37 Pac. 876; Harrelson v. Tomich, 107 Cal. 627, 40 Pac. 1032. Nor does this clause of the constitution invalidate an agreement by the mortgagor to pay all taxes on the land mortgaged; it applies only to taxes on the money loaned or on the security. Barnhart v. Edwards (Cal.) 47 Pac. 251.

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10. Corporate Bonds and Stocks.

In the case of State Tax on Foreign-Held Bonds, 15 Wall. 300, it was remarked that "public securities, consisting of state bonds and bonds of municipal bodies, * * * by general usage have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner." But as to the negotiable bonds of private corporations, such as railroad companies, the authorities are not in harmony. In some states it is held that such bonds follow the person of the owner, and can have no situs, for purposes of taxation, other than at the place of the owner's domicile. Railroad Co. v. Morrow, 87 Tenn. 406, 11 S. W. 348; Mackay v. City and County of San Francisco, 113 Cal. 392, 45 Pac. 696. In other states, however, it is considered that such bonds so far partake of the nature of tangible personal property that if the owner sends them out of the state of his domicile into another state, either for purposes of safe-keeping or to be held by an agent, they cease to be taxable in the former state and become subject to taxation in the state where they are physically present. State v. Howard County Court, 69 Mo. 454; In re Whiting's Estate, 150 N. Y. 27, 44 N. E. 715.

It is more generally agreed that stock in a private corporation has its situs for purposes of taxation at the domicile of the owner, not at the place where the corporation is located, or where the certificates of stock may be found, unless a different rule is prescribed by statute. In Tappan v. Bank, 19 Wall. 490, it was held that shares of stock in the national banks are personal property, and though they are a species of personal property which in one sense is intangible and incorporeal, yet the law which created them could separate them from the person of their owner for the purpose of taxation, and give them a situs of their own. But the great weight of authority is to the effect that corporate stock, when not thus separated by statute from the person of the owner, has its situs for taxation only at the place of the owner's domicile. Bradley v. Bauder, 36 Ohio St. 28; Newark City Bank v. Assessor of Fourth Ward, 30 N. J. Law, 13; Inhabitants of Great Barrington v. Berkshire County Com'rs, 16 Pick. 572; Whitesell v. Northampton Co., 49 Pa. St. 526; Seward v. City of Rising Sun, 79 Ind. 351. In the case of In re Bronson, 150 N. Y. 1, 44 N. E. 707, the question was raised as to the right of the state to impose taxes on the bonds and the stock of local corporations, under a statute providing for taxes on the transfer by will of "property within the state," when neither the bonds nor the certificates of stock were physically present within the state at the time, but were kept at the residence of the testator, who was a resident of another state. As to the bonds, it was held that they were not taxable. It was said by Gray, J., who delivered the opinion of the majority: "Whatever may be argued in support of the right to subject the bonds of domestic corporations to appraisement for taxation purposes under this act, when physically present within the state, upon some theory that they are something more than the evidences of a debt, and constitute a peculiar and appreciable species of property, within the recognition of the law as well as of the business community, such argument is certainly unavailing in this case, where the bonds themselves were at their owner's foreign domicile. They did not represent 'property within the state' in any conceivable sense. What property they represented consisted in the debt of their maker, and that species of property, unquestionably, must be considered to be, as a chose in action, the holder's and owner's, and to be inseparable from his personalty;" citing case of State Tax on Foreign-Held Bonds, 15 Wall. 300. But with regard to the stocks, it was held that a different rule should apply, and that they were taxable. "The attitude of the holder of shares of capital stock is quite other than that of the holder of bonds toward the corporation which issued them. While the bondholders are simply creditors, whose concern with the corporation is limited to the fulfillment of its particular obligation, the shareholders are persons who are interested in the operation of the corporate property and franchises, and their shares actually represent undivided interests in the corporate enterprise. The corporation has the legal title to all the properties acquired and appurtenant, but it holds them for the pecuniary benefit of those persons who hold the capital stock. They appoint the persons to

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manage its affairs. They have the right to share in the surplus earnings, and after dissolution they have the right to have the assets reduced to money and to have them ratably distributed. Each share represents a distinct interest in the whole of the corporate property. * * * Certificates of stock, in the hands of their holder, represent the number of shares which the corporation acknowledges that he is entitled to. In legal contemplation, the property of the shareholder is either where the corporation exists or at his domicile, according as it is considered to consist in his contractual rights or in his proprietary interest in the corporation. * * * As personalty the legal situs does follow the person of the owner; but the property is in his right to share in the net produce, and eventually in the net residuum of the corporate assets resulting from liquidation. That right as a chose in action must necessarily follow the shareholder's person; but that does not exclude the idea that the property as to which the right relates, and which is in effect a distinct interest in the corporate property, is not within the jurisdiction of the state for the purpose of assessment upon its transfer through the operation of any law or of the act of its owner. The attempt to tax a debt of the corporation to a nonresident of the state, as being property within the state, is one thing, and the imposition of a tax upon the transfer of any interest in or right to the corporate property itself is another thing. The corporation is the creation of state laws, and those who become its members, as shareholders, are subject to the operation of those laws, with respect to any limitation upon their property rights, and with respect to the right to assess their property interests for purposes of taxation."

H. CAMPBELL BLACK.

(88 Fed. 207.)

SIGUA IRON CO. v. GREENE.

(Circuit Court of Appeals, Second Circuit. June 13, 1898.)

1. TRIAL — MOTION FOR DIRECTION OF VERDICT — WAIVER OF RIGHT TO GO TO JURY.
   A party, by moving for the direction of a verdict, does not thereby waive any right he may have to go to the jury on questions of fact, and where both parties at the close of the evidence moved for the direction of a verdict, and both motions were denied, but the court, over the exception of one party, submitted a single issue of fact to the jury, such party is not estopped by his motion from assigning as error the failure of the court to submit the case generally.
2. SAME—DIRECTION OF VERDICT—QUESTIONS FOR JURY.
   The testimony of a party on a material issue, though uncontradicted, should be submitted to the jury if his adversary so requests.
3. CORPORATIONS—STOCKHOLDERS—CREATION OF RELATIONSHIP.
   The relation between a corporation and a stockholder is a contractual one, and, although an express contract between them is not necessary to its creation, there must be an assent by both parties, either express or implied.
4. SAME—SUIT AGAINST STOCKHOLDER—PROOF OF RELATIONSHIP.
   In an action by a corporation to recover an assessment, entries of defendant's name in plaintiff's books as a stockholder are not prima facie evidence that he is such stockholder.
5. SAME—ACQUIESCENCE IN ALLOTMENT OF STOCK.
   A person who approves, ratifies, or acquiesces in the transfer to him of shares of stock in a corporation is liable as a stockholder, though the transfer was originally made without his knowledge or consent.
6. SAME—TRIAL—WITHDRAWAL OF QUESTION FROM JURY.
   In an action to recover from defendant assessments on certain shares of stock which had stood in his name for some years on the books of the corporation, where it was a material question whether defendant knew

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such fact, and acquiesced in it, and he testified that he did not. but it was shown that during a portion of the time defendant, who owned other stock, was a director of the corporation, the plaintiff was entitled to have such question submitted to the jury.

7. EVIDENCE—CONTRADICTING WRITTEN CONTRACT—WHEN RULE APPLIES.
The rule that parol evidence cannot be received to contradict or vary a written contract does not apply as against either party in an action between a party to the contract and a third person, as the estoppel on which the rule rests must be mutual, and the third person is not bound by the contract.

This cause comes here on a writ of error brought by plaintiff below to review a judgment of the circuit court, Southern district of New York, in favor of defendant below, said judgment being entered upon a verdict directed by the court.

The action was brought by plaintiff, a West Virginia corporation, to recover a balance unpaid on some stock in said company, which it claimed to have been owned by defendant. The following outline of the facts and history of the case sufficiently indicates the points discussed in the opinion, infra: In the early part of the year 1890 a number of persons known as the "Sigua Syndicate" had obtained and held an option on certain mining property,—the legal title seems to have been in one E. D. Smith, as trustee,—and for the purpose of taking over and operating such property the plaintiff corporation was formed in April, 1890. Its authorized capital stock was $5,000,000. Of this $1,000,000 was treasury stock. $1,000,000 was issued full paid, and $3,000,000 was issued 65 per cent. paid. By an agreement known as the "Sigua Syndicate Agreement" all of the stock of this company was underwritten. The several signers agreed to transfer the option and leasehold to the company for said $5,000,000 capital stock, to return $1,000,000 of the full-paid stock to the company to be held as treasury stock for company purposes, and to take the number of shares set opposite their names, both of full paid and of 65 per cent. stock. All rights to any stock secured to the subscribers under this agreement were divided into 30 equal (syndicate) shares, and defendant subscribed, through E. D. Smith, his agent, duly authorized to make such subscription, for one-half share. In due course the shares of stock coming to defendant under this agreement were issued to him. All assessments thereon have been duly paid in money or services, and no claim by reason of his holding such shares has been made against him. Some of the subscribers to the Sigua Syndicate agreement, being of the opinion that they were taking more of the stock than they cared to hold, formed a pool to dispose of such surplus of 65 per cent. paid stock. Of course, no one wished to part with the full-paid stock. The object was presumably to get rid of possible liability for future calls. E. D. Smith was one of this pool. He contributed 1,250 shares, the whole number of shares in the pool being 10,000, which was one-third of the total number of 65 per cent. paid shares to be issued by the company. These 10,000 shares were put in Smith's hands by the members of the pool, to be disposed of. It turned out that considerably less than half of this pool of 10,000 shares was thus disposed of. The balance, of course, remained the property of the original subscribers, and was subsequently placed, or ought to have been placed, in their names on the books of the company. The fundamental question in dispute here is whether 400 of these 10,000 shares was disposed of to the defendant, or whether its original holder is still the owner, and liable for any unpaid balances thereon. The agreement by virtue of which it is contended that defendant engaged to take said 400 shares, and touching them, to become a stockholder in the company, is as follows:

"Agreement of purchase of Sigua Iron Company Stock. Capital stock, $5,000,000. Par value, $100 per share. $1,000,000 of capital stock to be left in the treasury of the company.

"We, the undersigned, hereby agree with the Sigua Syndicate to purchase from them, at $35 per share, the number of shares (of the par value of $100

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each), set opposite our names, respectively, the same being 65 per cent. paid, and liable to further calls and assessments to the extent of 35 per cent., said 35 per cent. being payable $^1/_{10}$, or 10 per cent., thereof, on call, and the remainder as required, probably at the rate of $^1/_{10}$, or 10 per cent. of said 35 per cent., every two months, or a proportionate part in case of over-subscription:

"Name.	Address.	Number of Shares.	Amount to be Paid.
B. D. Greene.	50 Broadway.	1,000	35,000
I. L. Pierson.	Care Adolph Boissevain & Co., Amsterdam.	500	17,500
Robert Fleming, Per E. D. S.	Care Maitland, Phelps & Co., New York.	500	17,500
W. M. Chauvenet.	St. Louis, 709 Pine St.	100	3,500
Samuel Bell, Jr.	208 So. 4th St.	100	3,500
H. M. Sill.	Schwl Lave, Gtn.	100	3,500
W. W. McKee.	Catasauqua.	200	7,000
J. W. Fuller.	"		
Chas. H. Audon.		100	3,500
A. P. Berlin, Per E. D. S.	Slatington, Pa.	100	3,500
F. F. Vandervoort.	Phg., Pa.	100	3,500
M. E. Olmstead, Per E. D. S.	Harrisburg.	200	7,000
Paul Thompson.	206 So. 4th St.	50	1,750
E. J. Collins.	Bullitt Building.	100	3,500"

The Sigua Syndicate did not sign this agreement, nor, so far as appears, was it or any agreement to sell ever signed by any of the members of such subsyndicate or pool. All of these transactions occurred before any certificate of stock had been made out by the company. On July 8, 1890, three certificates were made out to E. D. Smith, trustee,—two each for 10,000 shares full paid, and one for 29,995 shares 65 per cent. paid, and were issued to him on that day. Thereupon, and on the same day, he delivered back two of these (one of the 10,000 share certificates and the 29,995 share certificate), indorsed with a statement to whom the shares should be transferred. Transfers were thereupon made upon the books of the company, and stock certificates prepared in conformity to such list. Two certificates were made out in the name of defendant, covering his half share under the original syndicate agreement, and, in addition, one for 600 and one for 400 shares.

It will be observed that defendant's name is subscribed to the agreement of purchase for 1,000 shares. He accepted 600 of these, took stock certificate therefor, and, so far as appears, has responded to any calls thereon. It is as to the balance only—400 shares—that dispute has arisen. The defendant admits his signature to this document; his contention, briefly stated, being that he signed upon an express understanding with the representative of the sellers that he was to take only such part of the 1,000 shares as he could find outside purchasers for; that he notified Smith, the representative of the seller, and also notified the president of the company, that he had been able to place only 600 shares, and would take only that quantity, and that his contention as to the number of shares of stock which should be thus allotted to him was, so far as he knew, always acquiesced in by the company. He insists that he did not know these 400 shares had ever been transferred to him on the books, and that he never authorized or acquiesced in such transfer.

Upon the first trial of the action the case went to the jury, and plaintiff recovered verdict for the full amount. Upon appeal to this court judgment was reversed. The opinion is reported, but not in full, as Greene v. Iron Co., in 22 C. C. A. 636, 76 Fed. 947.[1] Upon the new trial two specific questions were put to the jury and upon their answers being received verdict was directed for defendant.

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[1] See, for a full report of this case, 88 Fed. 203.

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Howard A. Taylor, for plaintiff in error.
L. Laflin Kellogg, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). Before discussing the merits of this appeal, it will be well to dispose of a point of practice which was presented upon the argument. Plaintiff in error insists not only that upon the whole case it was entitled to a direction, but also that, if that be not so, there were disputed questions of fact which the court improperly took from the jury, and itself decided. Defendant in error insists that plaintiff in error is in no position to raise this objection. The point is thus stated in defendant's brief:

"Where, at the close of the evidence on a trial, both parties ask the court to direct a verdict in their favor, and the court directs a verdict for one side, to which the other excepts, but makes no request to go to the jury, it will be held that the parties have thus treated the case as presenting questions of law only, and, there being evidence to support the ruling, the judgment should not be assailed by showing that there were questions of fact arising on the evidence."

In support of this proposition are cited Provost v. McEncroe, 102 N. Y. 650, 5 N. E. 795; Sutter v. Vanderveer, 122 N. Y. 652, 25 N. E. 907; Daly v. Wise, 132 N. Y. 306, 30 N. E. 837; Board v. Beal, 113 U. S. 227, 5 Sup. Ct. 433; Robertson v. Edelhoff, 132 U. S. 614, 10 Sup. Ct. 186. The circumstance that a party, at the close of the case, moves the court to direct a verdict in his favor, does not, of course, operate to waive any right he may have to go to the jury. Such motion may be made, and most often is made, upon the theory that some controlling proposition of law would require a decision in the party's favor, although some or all of the disputed questions of fact were decided in his adversary's favor. But, if the court be not convinced as to the soundness of his proposition of law, he is none the less entitled to have his hearing before the triers of the facts upon any disputed material issues of fact in the case, unless in some way or other he waives his right, or leads the court to suppose that he concedes there is no material fact in dispute. In the supposititious case stated above, where both sides move for a direction, and one motion is granted and the other denied, and the defeated party takes an exception only, without any suggestion that there is some material fact in dispute that should go to the jury, the court is entitled to assume that he concedes there is nothing material for the jury to pass upon. But the case at bar is a very different one from that to which the authorities are cited. The proofs being closed, both sides moved for the direction of a verdict, but the court denied both motions. Two dispositions of the case, and two only, were then possible: A juror might have been drawn, or the case given to the jury. When cases are given to juries, it is the usual practice to require them to give a general verdict upon all the evidence. Until they were in some way notified that a special verdict would be required, both sides, their motions being denied, were entitled to assume that the verdict was to be a general one on the whole case. Thereupon

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the court announced that it was going to leave one question only to the jury, namely, "to find whether there was an agreement between the defendant and Smith, as trustee for the syndicate, by which Greene was to become an out and out purchaser of 1,000 shares, or whether it was, in substance, as the defendant claims, that he was only to take such shares as he could dispose of." "Then," added the court, "when that finding is in the case, I will direct a verdict either one way or the other." To this plaintiff duly excepted. When the court announced its decision to send only one question to the jury, it necessarily announced its decision to withdraw all other disputed material questions of fact from the consideration of the jury, and under the exception to such a disposition of the case plaintiff in error would be entitled to contend, as to any material question of fact, that it was improperly withdrawn from the jury. We find no force, therefore, in this preliminary objection.

Upon the first trial, the court left it to the jury to say upon all the evidence in the case whether defendant ever became a stockholder of plaintiff, directing their attention particularly to later transactions between defendant and the officers of the company subsequent to July 1, 1890. As to the agreement of purchase,—the second agreement, supra,—however, it gave the jury distinctly to understand that under its terms Greene succeeded to the rights and obligations of those from whom the 1,000 shares were to come, and that to relieve himself therefrom he would have to show in some way that he had been released and discharged. The jury were told that among the "undisputed facts in the case" were "Greene's purchase of one thousand shares," and "his liability to pay therefor unless he was somehow released." This court, upon appeal, reached a different conclusion as to this second agreement. We held that when it was signed "the syndicate did not have legal title to the shares, because they had not at the time been transferred to the syndicate upon the books of the company." We might have added—certainly upon the evidence now before us it stands uncontradicted—that the opening declaration of the agreement is a misstatement. "The undersigned" did not by that paper, nor by any other paper, nor orally, nor in any way, "agree with the Sigua Syndicate to purchase from them" the shares referred to. It is true that E. D. Smith, who was the trustee of the Sigua Syndicate, solicited subscriptions to the paper; but he himself says—and he was plaintiff's witness—that the shares he was trying to dispose of were the shares, not of the syndicate, but of individual members, who had formed a pool to get rid of their stock. Why the paper was so phrased as to delude the unwary subscriber into the belief that he was dealing with the Sigua Syndicate, and not with the individuals who were seeking to unload before a call, does not appear, but may be surmised. This court further held that it was merely an executory engagement for the purchase of shares, which, if it had been valid, would have rendered defendant liable in damages upon his failure to perform; but not a present contract of purchase. Moreover, we held that it was not a valid contract for want of consideration; that, if the syndicate had refused to transfer the shares to defendant, and he had sought redress for his dam-

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ages, it would have been a complete answer to his action that there was no promise on the part of the syndicate to transfer to him any shares. A like answer might have been made even by the individual members of the pool; while, as appears by the record now before the court, the Sigua Syndicate might truthfully defend upon the sufficient ground that it never had anything to do with the record agreement in any way, shape, or manner, its name being used merely as a figurehead by a man who showed no authority to act. Finally, we suggested that the agreement might perhaps be construed as a "unilateral contract * * *, in effect a request or proposal to the promisee, in which it is not necessary that the consideration should exist at the time of making the promise, and when, if the promisee acts upon the promise, it becomes obligatory; but in this class of contracts the promisor may always retract before performance by the promisee, and in the intermediate time the promise is inert." Whether the agreement in this case was to be thus construed we did not consider, "inasmuch as the defendant retracted his promise before the shares were transferred to him." For these reasons we reversed the former judgment, stating that it was error for the trial judge not to direct a verdict for the defendant. The views heretofore expressed in this court as to the nature and effect of the agreement called for reversal, but we were probably in error in holding that the trial judge should have directed a verdict for defendant. The evidence that "defendant retracted his promise before the shares were transferred to him" was that of Greene himself, and the testimony of a party on a material issue should always be submitted to the jury, even though uncontradicted, if his adversary so request.

In some important respects the case made upon the second trial is different from that under the evidence as admitted upon the first trial, and examined on the first appeal. Plaintiff's own evidence shows that the written document, known as the "agreement of purchase," and whose construction occupied the attention of the court on the former appeal, incorrectly expresses the result of the negotiations which it undertakes to record; that the Sigua Syndicate was not a party to such agreement, nor to any of the negotiations that led up to it; that it never agreed to sell its shares to the subscribers to such agreement, and never agreed with them that they should purchase, but that under the guise of the Sigua Syndicate a few of its members did undertake to relieve themselves from liability by selling some of their shares; and that signatures to such agreement were obtained to accomplish this object. Defendant put in stronger evidence, which induced the jury to answer the questions put to them, supra, the first in the negative, the second in the affirmative. The questions, therefore, presented on this writ of error differ materially from those considered when the first trial was under review. Before discussing them, it may be well to restate the fundamental proposition set forth in our former opinion that "a person cannot be constituted a shareholder in a corporation by a transfer of shares without his consent." The same proposition was enunciated by this court in Carey v. Williams, 25 C. C. A. 227, 79 Fed. 906, in these terms: "The relation of corporation and stockholder is a contractual one, and can

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only be created with the consent, express or implied, of both parties." This statement by no means necessarily implies that the relationship can be created only by express contract between the corporation and the stockholder. Plaintiff in error is quite correct in the suggestion that this occurs but rarely; substantially the only instance being in the case of an issue of treasury stock. In the case of a transfer of stock there is either a contract between transferror and transferee, whereby the latter acquires the rights of the former, or there is a gift, defined by some authorities as an executed contract, which is founded on mutual consent, for the minds of the parties must meet alike in the case of a gift and of a contract founded on consideration. When the purchaser, donee, or transferee has thus, by his own act, succeeded to the rights of the former holder of the shares, he has voluntarily assumed a relationship to the corporation which makes it the duty of the corporation to accept him as a stockholder, and to perfect his title by a transfer on the books, and makes it his duty to accept such transfer on the books and become a stockholder of record whenever the corporation or the former holder so requires. It seems hardly necessary to discuss whether this shall be defined as an implied contract or a quasi contract. The important fact is that assent by the newcomer is an essential prerequisite. We do not understand that there is any contention here that a man may be made a stockholder by the mere unauthorized entry of his name upon the books without his knowledge or consent, or that he may, without such knowledge or consent, be made a stockholder, even by act of the legislature. It is contended, however, that when a person's name appears on the books as a stockholder, no matter how it got there, such entry is prima facie proof that he is a stockholder, and the burden is on him to disprove it. This proposition was discussed and decided contrary to the contention of the plaintiff in error by this court in Carey v. Williams, 25 C. C. A. 227, 79 Fed. 906. The correctness of such ruling is, of course, questioned in the case at bar, and it is suggested in the brief that "the courts of the different states in this country are handing down decisions every few months directly to the contrary of Carey v. Williams." We find, however, on referring to the three authorities cited to this proposition, that in none of them is Carey v. Williams referred to, and that two of them were decided before the opinion in that case was itself handed down. Whatever may be held elsewhere, this court abides by its decision in Carey v. Williams, being unwilling to substitute a rule as to the probative force of such entries in the books, which, in some of the cases approving it, is called "a rule of convenience," when we are entirely satisfied that it would in many cases prove to be a "rule of injustice,"—unless constrained to do so by controlling authority. In Carey v. Williams it was fully explained why this court did not find such controlling authority in Turnbull v. Payson, 95 U. S. 418. Plaintiff in error refers to a later decision of the supreme court,—Finn v. Brown, 142 U. S. 56, 12 Sup. Ct. 136. In that case the language of Mr. Justice Clifford in Turnbull v. Payson is cited with approval, but no such proposition was necessary to the decision. A verdict had been directed against defendant as a stockholder. He contended

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that he had a right to go to the jury upon his own evidence that he knew nothing of the transfer to himself, and had not authorized it. The uncontroverted facts showed that 50 shares in a national bank were transferred to his name on October 29th, and a certificate made out. He had not theretofore owned any stock in the bank. On October 30th he was appointed a director and vice president. Section 5146, Rev. St. U. S., provides that every director must own in his own right, during his whole term of service, at least 10 shares of stock; and that, if he does not own such 10 shares, he cannot become or continue a director. Section 5147 requires each director, when appointed or elected, to take an oath declaring, inter alia, that he is the owner in good faith and in his own right of the requisite number of shares. In the absence of proof to the contrary, the supreme court held that it must be presumed defendant took such oath before he acted as director. On November 21st, at a directors' meeting at which defendant was present and voting, the resignation of the cashier was accepted, and defendant, as vice president, was authorized to act as cashier until a new cashier should be regularly appointed. Thereafter, and until the bank's failure in January ensuing, he acted under such authorization as cashier. Section 5210 provides that "the president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders * * * and the number of shares held by each." In view of these facts, it is not surprising that the supreme court held that defendant "must be presumed conclusively" to have had knowledge of what the books showed as to his holding of stock, and to have assented thereto.

The next question for consideration is whether, as the case is presented here, taking the contract between Smith and Greene as the jury found it, there was any authority for the transfer of the 400 shares to him on the books of the company. The entries in the books were made under Smith's direction. To what extent was that direction authorized? As to 166⅔ shares of full paid and 500 shares of 65 per cent. paid stock (being a one-half share in the syndicate), he had Greene's express written agreement to accept the same from the Sigua Iron Company. As to the 1,000 shares, he had the express written agreement of one or more of the other members of the Sigua Syndicate to accept the same from the Sigua Iron Company, and, in the absence of anything more, he should have directed transfer to them. As to a part of those 1,000 shares, however, he had, as agent for the persons who had originally agreed to take them, effected a sale to Greene, and such of them as were so sold he might properly have transferred to Greene's name, because by buying them Greene assented to such transfer. But as to any shares not so sold, Smith had no authority to make such transfer, and the only shares included in the sale were those which Greene might be able to dispose of to others. The evidence warrants the finding that 600 shares were thus disposed of, but upon the theory of defendant in regard to the second contract, which the jury found to be correct, we do not find in the record, as to the 400 shares, any contract of the defendant whereby he assented to their transfer to him, or any authorization

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by him to Smith of a transfer to him. We must conclude, therefore, that the mere entry of his name in the books and on the certificate for these 400 shares did not make him a shareholder as to them. It does not follow, however, as matter of law, that he was not a shareholder when this action was commenced. Although the mere transfer of stock on the books of the corporation to the name of an individual without his knowledge or consent imposes no liability, nevertheless, "if, after the transfer, he in any way approved, ratified, or acquiesced in such transfer," he will be held "liable to be treated as a shareholder." Keyser v. Hitz, 133 U. S. 149, 10 Sup. Ct. 290. Whether Greene knew that these 400 shares had been transferred to him, and stood in his name on the books, and whether, knowing that to be so, he took any steps to have them retransferred to the persons to whom, under the original syndicate agreement, they properly belonged, or "approved," "ratified," or "acquiesced in" the transfer to himself, were all questions of fact, and, if there was conflicting evidence thereon, it was for the jury to determine them. On the one side, defendant testified that he never saw the certificate for the 400 shares, or knew about its being in his name on the books. It appeared otherwise than by his testimony that on July 8th he wrote to the treasurer, inclosing check for an assessment on 600 shares (additional to his original 666), and stating that the other 400 shares subscribed by him had been taken by friends whom he might not see before going away (he left for Europe in July, and returned in August), but that as soon as he returned he would see them, and send in their names; that upon his return he informed the president of the company that these friends would not take the 400 shares, and that he could not place it; that thereafter he was never called on for any assessment (and there were several of them) on these 400 shares; that in subsequent treasurer's reports and at directors' meetings they were listed as "unplaced stock"; and that, when a request for payment was ordered by the directors to be made on "delinquent subscribers," his name was not included on the list, and no such request was made as to these 400 shares. On the other hand, it appears that from the date of organization (May 20, 1890) until April 11, 1892, he was himself a director. We do not hold that, as matter of law, it is therefore to be conclusively presumed that he knew his name stood in the stock certificate book as the holder of the 400 shares named in the unissued certificate. The case at bar differs materially from Finn v. Brown, supra. But it certainly was a circumstance proper to be considered by the jury when weighing his own testimony as to his ignorance of the fact. It also appeared that at the very directors' meeting at which the 400 shares were reported as part of the 2,120 "unplaced stock" it was identified as "B. D. Greene, 400 shares." Without expressing any opinion as to the weight of the evidence pro and con touching knowledge and acquiescence, we are satisfied that there was sufficient conflict upon the question to call for its submission to the jury; and in withdrawing it from their consideration, by submitting to them the single question as to the making of the contract over plaintiff's exception, we are of the opinion that there was error requiring a

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reversal and a new trial. A similar question was submitted to the jury on the first trial, but under instructions that the evidence showed that defendant had actually purchased the 400 shares, and was to be held liable thereon unless he showed that he had been released. Why this was error has been already pointed out. On the facts as they stand on this record, with the answer of the jury to the questions put to them, the burden would not be upon defendant to show that he had been released, but on plaintiff to show that defendant knew he was entered as a shareholder, and acquiesced therein by permitting the entry to stand with no effort to alter it.

Plaintiff in error insists that there is no distinction between the case at bar and Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739, where a verdict was directed in favor of the trustee of the corporation against the stockholder. In the case at bar, however, there is no pretense that defendant was an original subscriber as to the shares in controversy. He obtained them, if at all, from a prior owner; and only to the extent to which he contracted to take such shares did he give his assignor authority to have them transferred to him. In Hawkins v. Glenn, however, the defendant contracted directly with the company. He was an original subscriber in his own name for 250 shares. It was undisputed that he knew the shares stood in his name, for the certificates, made out in his name only, were sent to and received by him, and never returned.

It is desirable that the other assignments of error which have been argued here should be disposed of, so as to eliminate as many questions as possible from the next trial of the action. It is contended that there was error in admitting evidence to vary the terms of the written instrument referred to above as the "agreement of purchase." Some question is raised as to whether plaintiff's counsel had not waived the right to object by himself introducing evidence thereon. It is not by any means clear on the record that he did so. The evidence he produced was put in at the close of the examination of a witness who was about to leave town, and counsel expressly stated that it was out of order, and in rebuttal, should defendant himself give evidence tending to vary the terms of the written instrument. Moreover, the evidence thus offered by plaintiff did not tend to vary the terms of the written instrument, but the reverse. However, it is not necessary to pass upon this point. Assuming, for the sake of the argument, that the plaintiff's exception was timely, and that it had not been waived by his previous conduct of the case, it was, in our opinion, unsound. The true rule is aptly expressed by the court of appeals of this state in Lee v. Adsit, 37 N. Y. 78, as follows:

"The rule that parol extrinsic evidence shall not be received to contradict or vary a contract which is in writing applies only in controversies between the parties, promisor and promisee in such contract. * * * The writing is not conclusive as between one of the contracting parties and a third person. This doctrine is asserted in a multitude of authorities, but in many instances it is accompanied by remarks from which it might be contended that the privilege of explaining the written document was not accorded to him, who was a party to it, but only to his adversary. 1 Greenl. Ev. § 279; New Berlin v. Norwich, 10 Johns. 230; Evans v. Wells, 22 Wend. 345. But it is not so confined. According to Co. Litt. 352a, 'every estoppel ought to be reciprocal

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that is to bind both parties, and this is the reason that regularly a stranger shall neither take advantage of or be bound by an estoppel.' To this effect, see Jewell v. Harrington, 19 Wend. 472; Sparrow v. Kingman, 1 N. Y. 246. * * * In Reynolds v. Magness, 24 N. C. 30, after stating the general rule, and that it applies only as between the parties, and not to strangers, Judge Gaston says: 'They [the strangers] are at liberty to show that the written instrument does not disclose the full or true character of the transaction. And, if they be thus at liberty, when contending with a party to the transaction, he must be equally free when contending with them. Both must be bound by this [conventional law] or neither.' "

And the same court has since reiterated the same rule.

"Third persons are not precluded from proving the truth, however contradictory to the written statements of others. Strangers to the instrument, not having come into this agreement, are not bound by it, and may show that it does not disclose the very truth of the matter. And as, in a contention between a party to an instrument and a stranger to it, the stranger may give testimony by parol differing from the contents of the instrument, so the party to it is not to be at a disadvantage with his opponent, and he, too, in such case, may give the same kind of testimony." McMaster v. Insurance Co., 55 N. Y. 222. And to the same effect, Dempsey v. Kipp, 61 N. Y. 462; Lowell Mfg. Co. v. Safeguard Fire Ins. Co., 88 N. Y. 591.

Exception was reserved as to evidence tending to show notification to the company subsequent to July 9th that defendant had not placed the shares, and would not take them. If the case stood as it did on the first trial, the agreement, being an executory one,—an offer to purchase 1,000 shares,—which would have become binding upon the promisor if the promisee acted before the offer was retracted, this date would be of much importance, since it was on July 9th that the promisee transferred the stock. Subsequent retraction by the defendant would have availed nothing, and evidence thereof would have been immaterial and irrelevant. But in the shape the case took upon the second trial the evidence was admissible upon the question whether or not defendant knew that he was entered on the books as a stockholder, and acquiesced in such entry. And on the same theory the reports of the treasurer and the minutes of directors' meetings were competent evidence. The judgment of the circuit court is reversed, and cause remanded for a new trial.

(88 Fed. 217.)

McDOUGALL v. HAZELTON TRIPOD-BOILER CO. et al.

HAZELTON TRIPOD-BOILER CO. et al. v. McDOUGALL.

(Circuit Court of Appeals, Sixth Circuit. July 5, 1898.)

Nos. 537, 538.

1. CORPORATIONS—AUTHORITY OF PRESIDENT—ESTOPPEL.
   A corporation, which by resolution has empowered its president to pledge a contract, under which money is due it, as collateral security for money borrowed, cannot claim that the terms of the pledge made by the president are in excess of the authority conferred on him, when at the time of the pledge it was cognizant of all the particulars thereof, and received the money borrowed, and gave no sign of repudiating the transaction.

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2. SAME.
A pledgor cannot object that a sale of the thing pledged by one acting as agent of the pledgee was unauthorized by the latter, when it appears that such agent acted upon an assumption of authority, and that the pledgee was aware of the sale, and never made any objection to it.

3. PLEDGE—SALE BY PLEDGEE—NOTICE.
A pledgee, authorized by the terms of the pledge to sell the securities without notice to the pledgor, is not bound to notify the pledgor of the grounds on which he exercises the power of sale.

4. BILLS AND NOTES—MATURITY—DEMAND.
When a note is made payable five days after demand, an express demand in explicit terms is not in all cases and for all purposes necessary. If the payee signifies to the maker his desire for payment in such manner as to be the equivalent of a request, this is sufficient.

5. SAME—EFFECT OF SALE.
A sale of collateral by the pledgee pursuant to the terms of the pledge conveys the entire interest, so that the pledgor is not entitled, as against the purchaser, to a surplus realized by him beyond the amount for which the pledge was made.

6. SAME—EXPENSES OF REALIZING ON PLEDGED SECURITY.
A corporation, claiming money under a contract, after instituting suit thereon, pledged the contract with a third person as collateral, but continued to prosecute the suit in its own name, with a view of realizing for itself a surplus above the amount of the debt secured by the pledge. After it obtained decree, one who had purchased the contract from the pledgee under his power of sale intervened, and claimed the proceeds of the decree. *Held*, that the pledgor was not entitled to be repaid out of the fund the expenses incurred in prosecuting the suit.

7. ATTORNEY AND CLIENT—LIEN FOR SERVICES.
The rule giving attorneys and solicitors a lien upon the recovery for compensation for their services extends also to expenses incurred in rendering the services.

Appeals from the Circuit Court of the United States for the Northern Division of the Western District of Tennessee.

The original bill in this cause was filed on January 21, 1892, by the Hazelton Tripod-Boiler Company against the Citizens' Street-Railroad Company for the purpose of obtaining a decree, and enforcing a mechanic's lien upon a lot in Memphis on which were the steam power and machinery by which the railroad company operated its railway system. The amount for which a decree and the enforcement of the lien were prayed was the sum of $17,000, and some interest; the principal sum being the purchase price for three steam boilers furnished by the boiler company, a corporation located at Chicago, to the railroad company, a corporation doing business at Memphis, for the purpose of supplying the latter with power. The contract between the companies, under which the boilers were supplied, had been made in April, 1891, and the boilers were set up during that year; but the purchase price, though in terms due some time previous to the filing of the bill, had not been paid,—the railroad company having refused payment upon the ground that the boilers were defective, and not in conformity with the contract. Upon the filing of the bill the railroad company appeared and answered; setting up the faulty execution of the contract on the part of the boiler company in defense, and further alleging that the contract itself, in respect to the purchase, was modified by a further stipulation that it should not exceed the cost of construction. On June 6, 1892,—a few months after filing the bill,—the boiler company, being in need of funds, borrowed $10,000 from George Linyard, of New York, and gave him its promissory note therefor, with interest; therein also pledging the boiler company's interest in the contract with the railroad company above set forth. This instrument was in the language following:

"$10,000. Chicago, Illinois, June 6th, 1892.

"Five days after demand, for value received, we promise to pay to the order of ourselves the sum of ten thousand dollars, at our office, 1410 Manhattan

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Building, with interest at the rate of six per cent. per annum after date; having deposited with said legal holder of same, as collateral security, our contract with Citizens' Street-Railroad Company of Shelby County, Tennessee, Memphis, Tennessee, dated April 15, 1891, and accepted May 2, 1891, which we hereby give the said legal holder of said note, his agent or assignee, authority to sell, or any part thereof, on the maturity of this note, or at any time thereafter, or before, in the event of said securities depreciating in value in the opinion of said legal holder of said note, at public or private sale, at the discretion of said legal holder of said note, his assignee, without advertising the same or demanding payment, or giving us any notice, and to apply so much of the proceeds thereof to the payment of this note as may be necessary to the same, with all interest due thereon, and also to the payment of all expenses attending the sale of the said collateral, including attorney's fees; and in case the proceeds of the sale of the said collateral shall not cover the principal, interest, and expenses, we promise to pay the deficiency forthwith, after such sale. Hazelton Tripod-Boiler Co.,
"By C. B. Holmes, President."

In October, 1892, as Linyard alleges, he sent this instrument to L. H. Bisbee, one of the solicitors for the boiler company in the then pending suit, with instructions to collect it, and, after paying Linyard what was due him, to pay the balance to the boiler company. In December following, the boiler company, having become insolvent, made an assignment for the benefit of its creditors to G. W. Griffin, as trustee; and he subsequently became a party to the suit, as co-complainant. The taking of proof, and other preliminary matters, prolonged the suit for several years. In November, 1894, Linyard tendered, and by leave of the court filed, a supplemental bill, so called, alleging his acquisition of the note and pledge above mentioned, that he had sent the instrument to Bisbee, as above stated; that Bisbee had not collected the note, and had refused to return it to Linyard on the latter's request; that he had therefore revoked Bisbee's authority; and he prayed that the proceeds of the suit should first be applied in satisfaction of the note. To this bill the boiler company and Griffin, assignee, were made defendants, and they answered, admitting the substantial allegations of the bill. During the progress of the suit, and after considerable proof had been taken, the case was brought on for hearing; and the court, apparently being in doubt whether the contract for the boilers was modified to the extent that the price should not exceed their actual cost, ordered a reference to the master to ascertain and report what that cost was. This duty was performed by the master, but, as it was finally held by the court that the decree should be for the contract price, further reference to that report is unnecessary.

On January 6, 1896, Linyard, after having made, as he claims, repeated but ineffectual efforts to realize his debt by demand upon the assignee, and endeavor to sell his collateral, finally sold the contract to William McDougall for the sum of $11,000. On the 17th of the same month, Judge Hammond, who had heard the case, filed an opinion ordering a decree in favor of the boiler company for the amount specified by the contract, with interest. 72 Fed. 317. A few days thereafter, McDougall made application to the court for leave to file a supplemental bill setting up the transfer to him of the subject-matter of the suit, and praying that the decree might be entered in his favor. Leave to file this bill was postponed until after the decree should be entered. On January 31st the final decree in the primary controversy for $18,473.37 was entered in favor of the boiler company against the railroad company, and, this being done, McDougall's bill was permitted to be filed. Id. 325. The railroad company paid the amount decreed against it into court, and this was turned into the registry to await the determination of the claims upon it set up by various parties. The boiler company, upon grounds stated in the opinion, claimed that the pledge of the collateral in the note was unauthorized, and, further, that the sale by Linyard to McDougall was inoperative to convey more than so much of the interest in the contract as would suffice to pay the $10,000 borrowed from Linyard, with interest, and therefore it was entitled to the whole of the decree, or at all events to the surplus of the decree after that debt was satisfied. Bisbee and Metcalf & Walker,

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the counsel who had conducted the suit for the complainant, asserted a lien upon the fund for their services, the value of which, upon reference, was fixed at $3,000; and $131.70 were allowed them for personal expenses which they also claimed. Griffin made claim for his personal expenses incurred in the progress of the litigation, which by like reference were found to amount to $548.62. All these claims were denied by McDougall, who insisted that the whole amount of the decree should be paid to him. Upon final hearing, Judge Clark, who heard the case upon these controversies, held that the claim of the boiler company to the whole decree or to the surplus was not maintainable; that Bisbee and Metcalf & Walker were entitled to the lien claimed by them for counsel fees and expenses, in the amounts above stated; and that Griffin was not entitled to be reimbursed for his personal expenses incurred in the suit. A decree for distribution of the fund was entered accordingly. Some minor details of fact are noted in the opinion following. The boiler company and Griffin appeal from so much of the decree as denies their respective claims, and McDougall appeals from the allowance of the claims of Bisbee and Metcalf & Walker for counsel fees and expenses.

J. H. Watkins, for McDougall.

S. P. Walker, for Hazelton Tripod-Boiler Co.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge, having stated the case as above, delivered the opinion of the court.

The boiler company, upon its appeal, contests the right of McDougall to take the whole of the decree against the railroad company, subject to the lien of counsel, on various grounds:

1. It is urged that the pledge of the collateral to the note was void because in excess of the authority conferred upon Holmes, the president of the company, who transacted the business, by the board of directors. The resolution authorizing him in terms empowered him to assign the contract to the holder of the note, as security therefor, and to authorize such holder to collect the amount due on the contract, to satisfy himself for the sum due on the note, with interest, together with all expenses of collection, and thereupon to require him to account to the boiler company for the surplus. The note was negotiable, and it is manifest that it was anticipated that the note, with the collateral, might pass into other hands by transfer from the original holder. The collateral was an incident, and would pass by the transfer of the debt to the new holder, and he would be authorized to take all appropriate measures for the collection of the money due on the contract pledged. Construing the resolution of the board strictly, it might be doubted whether, if Linyard had known its terms, he could have enforced the payment of the note by a sale of the contract pledged. Possibly it might still have been competent for him to have urged that under the resolution itself he was entitled to the ordinary rights of a pledgee, which would have included the power of sale, as well as the right to enforce collection of it by suit. But it is not necessary to determine this question. We are satisfied that the boiler company knew of the particulars of the transaction as it occurred. Moreover, it received the money borrowed, and gave no sign of repudiating the means by which it had been obtained. It knew, and Griffin, the assignee, knew, that Linyard was for a consid-

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erable period endeavoring to sell the pledge, and no objection to his want of authority to make such sale was interposed. In these circumstances, it is evident that it cannot now be heard to disavow the terms of the contract by which it borrowed the money. Wilson v. Pauly, 18 C. C. A. 475, 72 Fed. 129, and 37 U. S. App. 642. It is further argued in support of this denial of authority that the power to sell without notice, if such power was given, did not include the power to sell without demand; but as we reach the conclusion, stated in discussing another branch of the case, that a sufficient demand was made, in the circumstances, we need not follow the subject further in this connection.

2. It is insisted by the boiler company that Woodbridge, who made the sale to McDougall for Linyard, is not proved to have had authority from Linyard to make it. But, while it is true that there is no direct proof of his appointment as agent, it appears that he had for some time previous to the sale been acting professedly for Linyard in trying to realize the debt from the sale of the collateral, and further that, in making the disposition of it to McDougall, he acted upon an assumption of authority from Linyard, in whose name he made the sale. The latter came into the suit in 1894, and has continued to be a party since, although only nominally such since the sale to McDougall in 1896. The circumstances are such that it must be assumed that he was aware of the sale of the boiler company's contract to McDougall, and from his acquiescence in it, and his failure to raise any objection to the decree of the court disposing of the proceeds to McDougall, either before or after the decree was entered,—undoubtedly with his full knowledge,—we think it may be fairly inferred that he recognized the sale as one made for him, and that he must be regarded as having ratified it. Clearly, he would be bound bv the orders and decree of the court in the suit to which he has been a party; and one of those orders was that permitting McDougall to file the supplemental bill, which was based upon the acquisition of Linyard's rights. We therefore think there was no error in holding the transfer to have been duly made, so far as the question of the authority to make it is concerned.

3. The next ground taken by the boiler company is that the sale of the pledge by Linyard was prematurely made. It is contended that it nowhere appears that the sale was made before demand for payment upon the ground that the pledgee regarded the security as depreciating in value. We know of no rule requiring the pledgee to make a formal announcement of the reason on which he exercises his power, if notice thereof has not been stipulated for in the contract by which the pledge is made. In this case notice of the sale was expressly waived by the pledgor, and it would not be unreasonable to hold that such a waiver was broad enough to include notice of the reason for making it. There is abundance of evidence to show that the pledgee might reasonably have regarded his security as depreciating. It was the subject of a litigation which had already been protracted for several years. It was being persistently defended, and costs and fees were accumulating. He had for some time been trying, without success, to dispose of his collateral, and had offered it for

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considerably less than the amount due him on his note, and the boiler company had become insolvent. We are disposed to believe that Linyard, in these circumstances, regarded his security as depreciating, and we think he would have been justified in selling the pledge on that ground. But we are also of opinion that sufficient had transpired to effect the maturity of the note.

It is insisted for the boiler company that no formal demand for payment of the note is shown, and that, as it was made payable five days after demand, it had not matured. It is no doubt quite elementary that the general rule applicable to an instrument thus drawn is, as contended, that demand of payment must be made, in order to fix its maturity. But an express demand, in explicit terms, is not in all cases necessary. If the payee signifies to the maker, and clearly makes known to him, his desire for payment, in such manner as to be the equivalent of a request, that is sufficient. A note in this form is held to be overdue after the lapse of a short period, varying, as held by the reported cases, from one to a few months, the presumption being that demand has been made, and payment refused; and upon this presumption the instrument is treated as dishonored. Here the note had been outstanding for more than three years. The boiler company had nothing with which to make payment, all its property having been assigned to Griffin; and Woodbridge, who had charge of the claim for Linyard, was for several months in communication with Griffin, seeking to make collection. He offered to take $11,000 for the collateral. Griffin entertained the proposition, and tried to raise the money. In 1894 Linyard had intervened in the suit, to which both the boiler company and Griffin were already parties; alleging nonpayment of the note, and praying to have the proceeds of the suit on the collateral applied in satisfaction of his claim. The boiler company and Griffin answered, admitting the substance of Linyard's bill, and stating that when the sum due from the railroad company was realized the claim of Linyard should be paid. The note itself had been sent to the boiler company as early as October, 1892, for the purpose of getting payment out of the contract pledged, and that company put the papers in the hands of Bisbee for the collection of the amount due Linyard. A formal demand upon the boiler company would have been wholly futile. We cannot doubt that there was in all these circumstances the equivalent of a demand, and that the note must be regarded as having been long past due when Linyard sold his pledge in 1896.

4. Another contention made for the boiler company is founded upon these facts: There is evidence tending to prove that McDougall's purchase was in the interest of one Billings, who was at the time of the purchase the owner of the large majority of the stock of the railroad company, and had also had a controlling interest in that company from its formation,—covering, of course, the date of the contract with the boiler company; that Billings had promised the railroad company to provide sufficient funds to meet its liabilities, among which was that of the boiler contract; that instead of doing this he caused to be set up what is alleged to have been a fictitious defense to the boiler company's suit; that by being kept out

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of the money due on the contract the boiler company became embarrassed, and, being unable to pay its debts, was obliged to make an assignment for the benefit of its creditors; and that this was the reason why it could not pay its debt to Linyard, and occasioned the sale of the collateral to McDougall as agent for himself. It is upon this proof alleged that Billings by false and fraudulent practices brought about the conditions which compelled the sale, and having effected it, and taken the benefit to himself, he became a trustee ex maleficio. But it is hardly conceivable that Billings could have been inspired by any such motive at the time when the contract for the boilers was made. There were no circumstances then which indicated that any such scheme was possible. The defense which the railroad company interposed was one which, if well founded, it was proper and competent for that company to make; and it appears that, upon full proof of the facts, the court was so much in doubt that a reference was ordered to lay the foundation for a decree that the contract was in fact such as the railroad company alleged it to have been. And, on looking into the evidence in the record, we are unable to say that it is at all clear that there was no fair ground for the defense, and that it was falsely interposed. Certainly there is no such preponderance of evidence leading to that conclusion as is required of one who charges another with a fraudulent motive. The charge in this instance seems mainly to rest upon the fact that the defense was not sustained by the court, for we find not much else to support it. Further, there is no proof that Billings made any promise to the boiler company that he would pay for the boilers. Indeed, it is clear from the record that the only promise, if it was such, which Billings made of the kind alleged, was a promise made to the railroad company. Confirmation of this is found in the fact that the boiler company has never attempted to hold Billings upon any obligation directly to itself. If, therefore, Billings failed to fulfill such an obligation, as the evidence possibly indicates, it was a matter in which the railroad company alone was concerned. And besides it is not proved that the defense was undertaken because of a lack of funds to pay the railroad company's debt. Up to about the date of McDougall's purchase there is nothing of consequence to show that Billings had conceived the purpose of making it. Our opinion of the probability is that Billings, being quite sure that there would, in any event, be a decree for a larger amount than Linyard's debt, thought it a good speculation for him to buy the collateral, and planned to do so. And we can find no reason for saying that he had not the same privilege to buy it as any other person had. He was in no trust relation to the boiler company, and a sale to him would not put that company in any worse position than a sale to any other person. It may be (though it is a question which we are not required to decide) that the railroad company, by virtue of his relation to it, could claim that the purchase should be held to have been made in its interest, and thereupon hold him as trustee. But that is another matter. It is clear that he stood in no such relation to the boiler company. In the case of Angle v. Railway Co., 151 U. S. 1, 14 Sup. Ct. 240, which is much relied upon by the appellant, two very

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essential facts existed, which, as has been shown, did not exist here. The first and most important one is that in that case there was an unlawful conspiracy between an intervening stranger and the managing officials of the debtor company to defeat the plaintiff's contract; and, in the second place, it involved the abstraction of all the debtor's assets out of which his claim could be collected. Stripped of these features, the case has little resemblance to this. For these reasons we think the boiler company's claim must fail. The sale by Linyard conveyed the whole of the company's interest in the contract. Trust Co. v. Young, 4 C. C. A. 561, 54 Fed. 759, and 6 U. S. App. 469; Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co., 86 Fed. 975, 982; Wade v. Railroad Co., 149 U. S. 327, 13 Sup. Ct. 892. Its insolvency was the cause of its loss of the pledge, and there is nothing shown in the conduct of the other parties which is sufficiently proximate to its misfortune to make them responsible for it upon any recognized doctrine of law or equity.

The appeal in respect to the claim of Griffin stands upon these facts: Griffin was the assignee of the boiler company. In the progress of the suit in which he intervened after the assignment, he incurred certain traveling and other expenses in giving his attention thereto. For the amount of these he makes claim upon the fund. He has already been reimbursed from the assets of the boiler company. The circuit court held that he was not entitled to maintain this claim, and we are of opinion that this conclusion was right. Under the general rule of law, the expenses incurred in enforcing the pledge must be borne by the pledgor (Gregory v. Pike, 15 C. C. A. 33, 67 Fed. 837); and, if the pledgee is compelled to pay them in the first instance, he has his remedy over against the pledgor. But here the pledgor had already instituted the suit in its own behalf at the time of the pledge, and it thereafter continued to prosecute it by its own counsel. After the assignment to Griffin he came in, and the suit was prosecuted by them jointly. It was thus prosecuted in their own interest; the purpose being to reduce the claim to judgment, and thereupon to obtain the proceeds after paying the sum for which it was pledged. They retained the control of the suit, and the only object of Linyard's intervention in 1894 was to obtain standing ground in the court, upon which he could be recognized when the fund should be brought in. This was the whole consequence of his intervention. It was an episode which formed no part of the main proceeding in the case. We can discover no ground upon which Linyard's pledge could be burdened with the expenses of the boiler company, or later of the assignee, in reducing the claim to judgment by a suit brought and controlled by itself for its own purposes. If such a claim could be supported, it is obvious that the costs might absorb the pledge, and leave to the pledgor the surplus intact.

McDougall appeals from that provision of the decree which allowed to Bisbee and Metcalf & Walker their claim for professional services in the case, fixed at $3,000, and their expenses in rendering such services, amounting to $131.70. The allowance of this claim is resisted on two grounds: First, because, as is urged, the lien of the solicitors

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had not become fixed on the 6th day of January, when the sale to McDougall took place; and, second, because they have denied and resisted the demand of the true owner of the claim. In respect to the first ground, it appears that the solicitors above named filed the original bill in behalf of the boiler company. When Griffin, the assignee, joined, they continued to represent the parties complainant; and this was their position in the case at the time of, and subsequent to, the filing of the intervening petition of Linyard. He took no step to displace them, but in effect allowed them to continue the prosecution of the suit; his intervention being, as already indicated, simply to obtain a foothold in the case, and be in position to demand the recognition of his rights when the proceeds of the decree should be paid in. At the date of the entry of the decree they were still the solicitors for the complainants. McDougall's purchase was made on the 6th of January. The opinion of the court, announcing the final determination of the merits of the case, was handed down on the 17th. McDougall filed his application for leave to intervene on the 25th. The court denied the application for the time being, and on the 31st of the same month entered the final decree, in accordance with its opinion filed on the 17th, in favor of the original parties complainant, and against the railroad company. McDougall was thereupon allowed to intervene. Whether the court was influenced in some measure in delaying the allowance of McDougall's intervention by the purpose to preserve the lien of the solicitors upon the fund, does not appear. But, if it was, we think it was not improper. These solicitors had carried on the contest from the beginning, and had brought it to an altogether successful result. The professional labor in the case was substantially ended, and the fruits of their service were already in sight. The litigation was ended, and nothing remained but the formal entry of the conclusion already declared by the court. If there were anything in the circumstance that the decree had not been entered when McDougall presented his supplemental bill, and applied for leave to intervene in the suit, even if the court had then allowed it to be done,—a point we do not decide,—it was a bare technicality; and McDougall has no equity to complain that the court did not allow him at the nick of time to stand in and prevent the formal act which would fix the lien. By the law of Tennessee, attorneys and solicitors have a lien upon the recovery, whether by judgment or decree, for their services in the case. Hunt v. McClanahan, 1 Heisk. 503; Perkins v. Perkins, 9 Heisk. 95; Damron v. Robertson, 12 Lea, 372; Roberts v. Mitchell, 94 Tenn. 277, 29 S. W. 5; Brown v. Bigley, 3 Tenn. Ch. 618. The assignee of a judgment takes it subject to the lien. Cunningham v. McGrady, 2 Baxt. 141. And although it does not appear that the question has ever been considered by the supreme court of that state whether the same rule would apply to the expenses incurred in rendering such services, we can see no reason for a distinction. The labor and the money expended are equally the property of the lawyer, and alike necessary to the prosecution of the suit. In substance, they are intrinsically connected,—the service, and the expenses incurred in rendering it. The other reason assigned for the rejection of this claim is that the solicitors have denied, and continue

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to deny, the right of the true owner of the decree. The basis of this allegation consists in the fact that as solicitors for the complainants they have adhered to their clients, and have presented and urged the claims of those clients to the decree, or some part of it. There was no departure from duty in this. It was hardly to be expected that upon such an issue they would go over to the opposite party. The rule relied upon, that the lien is lost by hostile action towards the owner, rests upon the assumption of a repudiation of his duty by the attorney, and has no application to the present case. The solicitors did not have their lien by virtue of any relation to Linyard or McDougall, but upon the ground that they had prosecuted the suit for the recovery of this fund to a final decree for parties entitled to maintain it. There was no error in sustaining this claim.

None of the assignments of error being sustained, the decree appealed from is affirmed. McDougall will recover his costs on this appeal and in the court below against the boiler company and Griffin, as between those parties, and Bisbee and Metcalf & Walker will recover their costs against McDougall in this court and in the court below.

(83 Fed. 519.)

THE ELTON.

MARQUEST v. GRANT.

(Circuit Court of Appeals, Fourth Circuit. November 24, 1897.)

No. 235.

1. ADMIRALTY PROCEDURE — REFERENCE TO COMMISSIONER — EFFECT OF FINDINGS.

   Where, by written consent of the parties, the cause is referred to a commissioner, his findings of fact are entitled to the same weight as the findings of a master in chancery, and will not be disturbed when based on conflicting testimony or the credibility of witnesses, or so far as there is any testimony consistent with the finding.

2. SHIPPING—INJURY TO STEVEDORE—DEFECTIVE APPLIANCES—CHARTER PARTY.

   By a charter party, only the freight room was hired, and the vessel remained in the control of the owner, the master and crew continuing his servants. The loading was to be done by a stevedore employed by the charterers, but under the supervision of the master, and the vessel was to furnish the use of her tackle and appliances for loading. *Held*, that the vessel was liable for an injury to one of the stevedore's employés, resulting from the use of defective appliances.

3. SAME—ASSUMPTION OF RISKS.

   A member of a stevedore's gang does not assume extraordinary risks which arise from the use of unsafe appliances in loading.

Appeal from the District Court of the United States for the Eastern District of South Carolina.

This was a libel in rem by George Grant against the steamship Elton to recover damages for personal injuries. In the circuit court a decree was rendered for the libelant, and the master of the steamship appealed.

J. P. Kirlin, for appellant.

W. Huger Fitzsimons, for appellee.

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Before GOFF and SIMONTON, Circuit Judges, and PURNELL, District Judge.

SIMONTON, Circuit Judge. This case comes up on appeal from the district court of the United States for the district of South Carolina, sitting in admiralty. The libel is filed by George Grant, one of a stevedore's gang, who was at work in the hold of the British steamship Elton, of which the appellant was master. The vessel was under charter party for a lump sum. The cargo furnished by the charterers consisted of cotton in bales, and of pig iron. The appliances furnished for loading the pig iron were at first large buckets, such as are used in loading coal. These were discontinued, and the pig iron was sent into the ship at the same time as the bales of cotton. The cotton bales were placed, three or four of them, in a sling, and from three to six pieces of pig iron were placed in the sling with the cotton. Naturally, if the contents of the sling struck the side of the ship or the deck or the combing of the hatch as they were hoisted in, one or more of the pieces of pig iron were liable to fall out. The libelant charges that, while he was at work in the hold, he was struck by a bar of pig iron, which fell down the hatchway, as it was being put into the vessel; also, that this pig iron fell because of the negligence of the master of the ship in his failure to provide suitable and safe appliances for loading the iron, and also for failing to provide a safe place for him while engaged in the performance of his duties, and also in using unsafe, defective, and insecure appliances. The answer denies the allegation of negligence; sets up the defense of accident, negligence of fellow servants, and risks incident to the employment; and also, by way of reduction of damages, pleads contributory negligence on the part of libelant. The cause, being at issue, came before the court below, which granted an order, presented with written consent of counsel on both sides, referring the cause to C. J. C. Hutson, Esq., as commissioner, to take the testimony thereon, and to report all matters of law and fact arising in said case, with his conclusions thereon. The commissioner took all the testimony, and made his report thereof, and of the law relating thereto, giving his conclusions thereon. As conclusions of fact, he held that the use of improper and unsafe appliances was the proximate cause of the injury to the libelant, without any contributory negligence on his part; and, as a conclusion of law, he held the vessel responsible in damages. These conclusions of the commissioner, having been submitted to the court, met with its approval. They were adopted by the court below, and the report of the commissioner was ordered to stand as the judgment of the court. It comes here upon assignments of error.

The reference to a commissioner was authorized by rule 44 in admiralty. The commissioner, under that rule, had and possessed all the powers in the premises which are usually given to and exercised by masters in chancery in references to them. The reference was with the written consent of parties, and was presented to and made by the court as the result of such consent. The same regard must be had for the findings of the commissioner under these circumstances

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as would have been shown to the findings in a report of a master in chancery. The conclusions of a master on matters of fact are, under all circumstances, entitled to great respect. Medsker v. Bonebrake, 108 U. S. 71, 2 Sup. Ct. 351; Tilghman v. Proctor, 125 U. S. 149, 8 Sup. Ct. 894; Callaghan v. Myers, 128 U. S. 666, 9 Sup. Ct. 177. And when, as in this case, both parties present to the court a consent order providing for a report by the master of his conclusions upon the facts and the law, the court will not disturb his conclusions of fact, unless they are clearly in conflict with the weight of the evidence. Kimberly v. Arms, 129 U. S. 524, 9 Sup. Ct. 355.

The rule is clearly stated by Mr. Justice Brown in Davis v. Schwartz, 155 U. S. 636, 15 Sup. Ct. 237:

"As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusion of law thereon, we think his finding, so far as it involves questions of fact, is attended by a presumption of correctness, similar to that in the case of finding by a referee, the special verdict of a jury, the findings of a circuit court under Rev. St. § 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony to support it. But so far as it depends on conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with finding, it must be treated as unassailable."

Applying this rule to the case before us, we must consider as established the facts found by the commissioner, that the injury to the libelant was caused by defective appliances used in loading the ship, without any contributory negligence on his part. These facts being established, the question remains, is the ship responsible? This depends upon the construction of the charter party. The charter party was for a lump sum, and only the freight room was hired; so the ownership of the vessel remained in the original owner, and the master and crew continued to be his servants. Scrutton, Charter Parties, 3.

The charter party provides:

"Charterers are to pay for loading cargo and compressing cotton in presses at loading point, but no other charges, and the stevedore to be appointed by them, who is to load steamer under captain's directions. Charterers are not to be held responsible for improper stowage."

So, although the cost of loading cargo and the selection of the stevedore are in the charterers, the work of loading and the stevedore himself are to be under the captain's directions. In other words, at no time does the master lose his proper place in control of his ship and everything connected therewith. The stevedore is not an independent contractor doing the work, which, when completed, is to be turned over to the master for his approval or disapproval; but he must load the steamer at all times under the direction of, and so subject to, the control of the master. See The Alejandro, 6 C. C. A. 54, 56 Fed. 621. And see, also, George W. Bush & Sons Co. v. Thompson, 13 C. C. A. 148, 65 Fed. 812.

The next provision in the charter party bearing on this question is:

"Steamer to furnish use of her tackle and engine drivers in loading cargo and trim or discharge her ballast, as charterers may wish, at her expense, and to work night and day if required."

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It will be observed in the first extract from the charter party that all that is required from the charterers is that they pay for loading cargo, and also that they pay the stevedore, whom they can appoint; but, nevertheless, the loading shall always be under direction of the captain. Nowhere else but in the clause last quoted is there any mention of the appliances to be used. Nor does the record disclose any evidence on this point. The conclusion follows that these appliances were to be furnished by the ship. As the use of the appliances was for the loading of the ship, and as this loading was under the direction of the master, notice of their condition and imperfection was brought home to him. The case before us is not in any respect like that of The Persian Monarch, 5 C. C. A. 117, 55 Fed. 333, decided by circuit court of appeals of the Second circuit. In that case the ship had furnished safe appliances for loading, but the stevedores, instead of using them, used others on the ship, which were defective. For this the ship was not responsible. In the case at bar the only appliances for loading pig iron furnished by the ship were buckets and the slings which were used. The stevedore, who was called by and who gave evidence for the claimant, testified that the buckets were more dangerous than the slings, and the use of them had been discontinued. Under the circumstances stated, the vessel is responsible for the unsafe appliances. The Rheola, 19 Fed. 926; The Kate Cann, 2 Fed. 241.

It is earnestly contended, however, that the libelant was engaged in an employment whose dangers he knew, and whose risk he assumed. This is true. But he assumed dangers arising from the employment itself; not extraordinary risks, least of all the risk of unsafe appliances. Gardner v. Railroad Co., 150 U. S. 359, 14 Sup. Ct. 140, and cases quoted; Mather v. Rillston, 156 U. S. 391, 15 Sup. Ct. 464. Considering the whole case, we see no error in the court below. The decree appealed from is affirmed, with costs to appellee.

(88 Fed. 226.)

CITY OF DENVER et al. v. SHERRET.

(Circuit Court of Appeals, Eighth Circuit. June 27, 1898.)

No. 1,061.

1. CITIZENSHIP—CHANGE OF DOMICILE.

Plaintiff, who had always resided in Kansas, as a member of her father's family, went to Denver, Colo., where she took an examination for the position of teacher in the schools, intending, if successful, to remain there, but, if not, to return to Kansas. Before the result of her examination was known, she was seriously injured, and, when sufficiently recovered, returned to her father's home, in Kansas, where she remained. *Held*, that she did not cease to be a citizen of Kansas.

2. MUNICIPAL CORPORATIONS—ELECTRIC LIGHT POLES IN STREETS—LIABILITY FOR DEFECTS.

A city, by authorizing the erection by an electric light company of poles and wires in the streets, does not become chargeable with the duty of inspecting such structures, and maintaining them in a safe condition for the protection of persons using the streets for travel, to the same extent as though it had itself erected them; but its duty extends only to a general

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supervision over the light company, and it is liable for injuries caused by defects only when it has been negligent, after actual or constructive notice of such defects. Thayer, Circuit Judge, dissenting.

3. PARTIES—JOINDER OF DEFENDANTS—MOTION TO REQUIRE ELECTION.
Where an action was brought against a city and an electric light company as jointly liable for an injury to plaintiff, and no objection to the joinder was taken by motion or demurrer, but defendants both answered, a motion made when the cause came on for trial to require plaintiff to elect which defendant she would proceed against was, in effect, a motion for separate trials; and, being addressed to the discretion of the court, its ruling thereon is not reviewable.

4. ELECTRIC LIGHT COMPANY—LIABILITY FOR DEFECTIVE POLE—INSTRUCTIONS.
An instruction that it is the duty of an electric light company having poles in the streets to make such inspection of them, "from time to time, as will determine and ascertain whether decay has taken place to such an extent as to render the timber unfit for use," is misleading, where the defect shown by the evidence was not visible from the outside, as apparently requiring that the inspection must be effectual and going beyond the ordinary requirement of reasonable and ordinary care.

5. SAME—NOTICE OF DEFECT—KNOWLEDGE OF EMPLOYE.
The discovery of a defect in an electric light pole by an employé of the company while in the line of his employment, and whose duty it is to report it to his superiors, is notice of such defect to the company.

6. SAME—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE.
The fact that plaintiff was walking diagonally across the street when struck by a falling electric light pole and wires does not tend to establish contributory negligence, in the absence of any facts which would charge her with notice that there was greater danger in so crossing.

7. DAMAGES FOR PERSONAL INJURIES—FUTURE EARNINGS.
An instruction that, if the jury found that plaintiff's injuries would impair her ability to carry on her occupation as school teacher in the future, she was entitled to recover as damages therefor the amount of salary she would have earned during the time she would be so disabled from pursuing her occupation, is erroneous; the true rule being that, upon all the evidence, the jury should award such fair sum as would, in their judgment, compensate for the lessened or destroyed ability to earn money, making due allowance for the contingencies and uncertainties that inhere in such matters. Thayer, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Colorado.

T. J. O'Donnell (Milton Smith, on brief), for plaintiffs in error.
D. V. Burns, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. This action was brought in the circuit court for the district of Colorado by the defendant in error against the city of Denver and the Denver Consolidated Electric Company to recover damages for personal injuries caused her by the falling of an electric light pole to which were attached the wires which supported the lamp used in lighting the city streets. In her petition, the plaintiff, as ground of jurisdiction, averred that she was a citizen of the state of Kansas, and that the defendants were corporations created under the laws of the state of Colorado. In the answers filed, the defendants took issue on the averment of the citizenship of the plaintiff, claiming that she had become a citizen of the state of Colorado. The issue thus made was heard and determined before

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entering upon the merits of the case, and, upon the conclusion of the evidence adduced on that issue, the court instructed the jury to find thereon in favor of the plaintiff, and this ruling is now assigned as error. The point at issue was: Of what state was the plaintiff a citizen when this action was brought, on the 29th day of October, 1897? The evidence showed without dispute that the plaintiff had been born in Hiawatha, Kan., and had lived there all her life, as a member of her father's family, being engaged as a teacher in the public schools of that place, until, in May, 1897, she went to the city of Denver, for the purpose of endeavoring to secure a position in the schools of that city; and she and her father both testified that, if she failed in securing such position, it was her intent to return to Kansas, and continue her occupation as a teacher in Hiawatha. On the 21st and 22d days of June, she underwent the requisite examination before the school board of Denver; but, before the result was known, she was injured as stated, and, when sufficiently recovered, she returned to her father's house, in Hiawatha; and since that time she had continued to live at Hiawatha as an inmate of his family. The utmost that could be fairly claimed under the evidence in this case is that it was the purpose of plaintiff to change her place of residence from Hiawatha to Denver in case she was successful in obtaining a position as teacher in the schools of the latter city; but this position was not obtained, and the plaintiff still continues to be a member of her father's family, at Hiawatha. Clearly, therefore, there was not any evidence in the case which would have sustained a finding that on the 29th day of October, 1897, the plaintiff was a citizen of the state of Colorado, and had ceased to be a citizen of Kansas; and, this being true, the court did not err in directing a verdict on this issue in favor of plaintiff, thus sustaining the jurisdiction of the court.

Upon the merits of the case, it appeared from the evidence that the Denver Consolidated Electric Company, under an ordinance of the city of Denver, had obtained the authority to place in the city streets the poles and wires necessary to enable it to furnish electricity for lighting purposes; that, in pursuance of this authority, it had maintained at the intersection of Seventeenth and Stout streets a pole and wires, and also a lamp attached to wires, for the purpose of lighting the street; that on the 22d day of June, 1897, this pole fell down, carrying with it the wires attached thereto, which struck the plaintiff, who was then crossing the street, and severely injured her. The plaintiff further introduced evidence tending to show that the pole had been erected for a number of years; that it had become rotten in the part subjected to the dampness of the earth, which condition could have been readily discovered by proper examination of the pole; and it was claimed on behalf of plaintiff that both defendants had been guilty of negligence in thus allowing the pole to remain in the street after it had become rotten. Both the city and the electric company are joined as defendants to the action, but it will probably aid in a clear understanding of the questions involved if the case is viewed—First, as an action against the city alone, and, second, as one against the electric company.

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In defining the legal duty imposed upon the city, the court charged the jury that:

"The city of Denver, as a municipal corporation, is charged with the duty of keeping the streets in a safe condition. If it does anything directly to render them unsafe, it is liable in damages for the act. If it permits another to do anything which renders the streets unsafe, it is liable, and the person doing it will be liable in the same degree. If the city had erected this pole which fell, and the falling of which, it is alleged, caused the injury, and had allowed it to get into a condition which caused it to fall, it would be liable for any injury resulting from such fall; and permitting another, the Consolidated Electric Company, to maintain the pole, in no manner changes the position of the city in the matter."

Exceptions were duly taken to the cited portions of the charge of the court, and we have thus presented the question whether the charge correctly states the duty imposed by the law upon the city with respect to the poles placed in the streets of the city by the electric company. The court instructed the jury that, as the city was charged with the duty of keeping the streets in a safe condition, it was charged with the duty of inspecting the poles from time to time, in order to ascertain their condition; and, in effect, the court laid down the rule that the city was bound to do all that would have been required of it had the city itself been the owner of the electric plant, including the poles used in connection therewith. If this liability exists with respect to the poles erected in the streets, it must also exist with respect to the wires and lamps attached thereto, for it will be remembered that it is not claimed that the mere erection of the pole which fell created an unlawful obstruction of the streets; but the theory of the trial court was that, as the city permitted the electric company to erect the pole as part of its lighting system, the city was charged with the duty of inspection, by reason of the duty of the city to keep the streets in a safe condition, and therefore, as the city permitted the electric company to string its wires along the streets, and hang its lamps over the same, the same duty of inspection must exist with respect to the wires and lamps as exists with respect to the poles. It is well known that, in the development of urban life, city streets are now used, under legislative sanction, for many purposes other than for the passage of persons, animals, and vehicles along the same. Underneath the streets may be placed conduits for the conveyance of water and gas, while above ground are found telegraph and telephone wires, electric light and power wires, and electric street-car wires, all suspended along and over the streets, and experience has demonstrated that the presence of these wires creates a new danger in the use of the public highways. If what is called "a live wire" becomes broken and falls into the street, it may cause the death of all persons or animals coming into contact therewith. So, also, it has been demonstrated that, in the running of cable cars through the streets of a city, a danger is created to the public, in that occasionally the machinery forming the grip does not properly act, and the car cannot be stopped, but may be dashed into other vehicles, causing injury to persons and property, or the cable itself may become defective, and thus cause an obstruction to the free use of the street. If the ruling of the trial court in this case is sustained, to

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the effect that, because the city permitted the electric company to erect the pole in the street as part of its electric system, the city became charged with the duty of inspecting the pole, the same as though it was owned and operated by the city, then it must follow that, because a city permits the use of its streets for telegraph, telephone, electric light, and power systems, as well as for the use of cable and electric street-car systems, the city is charged with the duty of inspecting all the poles, wires, lamps, cables, and cars used in connection with these systems in the public streets, in order to prevent obstructions being caused to the safe use of the street, through defects in the appliances used for these several purposes.

The trial court charged the jury that, if the city was liable in this case, it was by reason of its omission in the matter of inspection. But it is apparent that inspection is merely a means to an end, and, if the city was under obligation to inspect, it is because the city was under obligation to maintain the pole in a safe condition; and that this was the meaning of the court in its charge is clear from the statement that:

"If the city had erected this pole which fell, and the falling of which, it is alleged, caused the injury, and had allowed it to get into a condition which caused it to fall, it would be liable for any injury resulting from such fall; and permitting another, the Consolidated Electric Company, to maintain the pole, in no manner changes the position of the city in the matter."

Thus, the jury were instructed that they must view the case just as they would be required to do if it appeared that the city had itself erected the pole as part of a lighting system erected, owned, and operated by the city. Any corporation, municipal or otherwise, or any person that may be the owner of an electric light and power plant, is under obligation to use ordinary care in the maintenance and operation thereof, in order to prevent injury to third parties; but it cannot be true that, simply because a municipal corporation permits another to erect and operate such a plant in the city streets, it becomes charged with the duty of maintaining the poles, wires, and lamps connected therewith in a safe condition. The charge given to the jury was to the effect that the obligation resting upon the city was just the same as though the city had erected and owned the pole; that, therefore, it was under obligation to inspect the pole from time to time, to the end that it should be kept in a safe condition; and that if, through the failure to properly inspect the same, it was allowed to become rotten and fall, the city would be liable for the results thereof. If this is a correct statement of the law, it follows that with respect to all the appliances in the shape of poles, wires, lamps, cables, and the like placed in the city streets, by telegraph, telephone, electric light, electric power, electric and cable street-car companies, there rests a primary duty and obligation upon the city to keep them in safe condition, and to make the inspections necessary to detect defects in order that the same may be promptly repaired. If this duty rests upon the city, then it will be compelled to keep in its employ men who possess the knowledge and skill needed to detect defects, and, when detected, to repair and keep in proper condition the electric wires and the cables and other appliances used

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in the streets; and it is apparent that this would, of necessity, lead to a conflict, in many instances, between the city and the companies owning and operating the electric and cable plants. In support of the charge of the court upon this point, counsel for the defendants in error cite a number of cases decided by the supreme court of the United States and the supreme court of Colorado, in which the duty of inspecting the streets is recognized; but they are all cases based upon defects in bridges, sidewalks, or carriageways, wherein the primary duty of erecting and maintaining the same, as part of the highway, was upon the city, and wherein the duty of inspection exists, because the duty of keeping in repair rests primarily upon the city; but none of these cases involved the point now under consideration. In this case, the trial court held, and the contrary is not contended for by counsel for defendant in error, that the original erection of the pole was lawful, and did not constitute an obstruction in the street; and therefore the question is narrowed down to the point whether the city is bound to inspect from time to time all poles, wires, lamps, and cables that may be lawfully placed in the streets, for defects therein, and to repair such defects in order to prevent them becoming an obstruction to the safe use of the streets, or whether the rights of the public are not sufficiently protected by imposing the duty of keeping watch over these appliances upon the corporation or person owning and operating the same, and holding the city liable only in cases wherein, after actual or constructive notice of the existence of danger to the public in the use of the street, growing out of or caused by some defect in the poles, wires, or other appliances, the city does not use diligence in obviating the danger thus created. Believing this to be the extent of liability incurred by the city under such circumstances, it follows that the trial court erred in holding that the same rule must obtain as would be applicable if the city had itself erected the pole for its own purposes.

Coming now to a consideration of the errors relied on as grounds for reversing the judgment against the electric company, the first one presented is that the trial court erred in overruling the motion made by the defendants when the case was called for trial, that the plaintiff be required to elect whether she would proceed against the city of Denver alone, or against the electric company alone, on the ground that the defendants were not joint tort feasors, and were not jointly liable to plaintiff. In form, the complaint charges the defendants with a joint liability. The defendants did not, by motion or demurrer, present the question whether they were properly joined in the action, and in the answers filed no issue or question of this nature was presented. The case coming on for trial, the defendants then moved that plaintiff be required to elect whether she would proceed against the city or the electric company, which was, in effect, asking the court to order separate trials. As the record then was, this was but an appeal to the court to exercise its discretion in determining whether there should be separate trials of the issues presented by the answers. If the motion had been granted, and plaintiff had elected to proceed against the city, the case would still be

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left pending against the electric company, as the motion did not ask a dismissal of the case as against either defendant. Motions of this character, being but appeals to the discretion of the trial court in regulating the order of trial, do not usually present questions upon which an appeal lies, and this case is not an exception to the general rule.

The principal grounds relied on for a reversal of the judgment against the electric company are found in the charge of the court, touching the duty of the company with respect to the pole erected by it, it being claimed on behalf of plaintiff in error that the court, in effect, made it the duty of the company to exercise such a supervision of the poles forming part of its system that it would certainly detect defects therein rendering the poles unsafe. It will be remembered that negligence against the company was charged in two particulars: First, that the company failed to properly inspect the pole from time to time, and thus it was allowed to become rotten and unsafe; and, second, that, some days before the pole fell, actual notice of the unsafe condition of the pole was brought home to the company, and, with this notice, the company neglected to make it safe. The portions of the charge to which exceptions were taken are as follows:

"The pole in question was unquestionably a good one when it was erected. It was large enough, and apparently strong enough. If it had broken down immediately, no negligence could be imputed either to the city or to the company on account of the fact. If it had been overthrown by a great storm, as sometimes happens, immediately after its erection, there would be no act of negligence imputable either to the city or the electric light company in respect to it. But it was charged and alleged in the complaint that it was allowed to stand for such time that it became decayed and weak, and that it fell in consequence of such weakness. If this is a fact, and no measures were taken either by the city or the electric light company, to ascertain its condition, or if the measures were not effectual, if they were not such as should have been taken to ascertain the condition of the pole, then the liability exists in the same manner. * * * The defect which existed in it, if there was such defect, being rotten at the surface of the ground or below the ground, was one which was not open to ordinary observation. If there was a shell which was not decayed, it would be necessary to penetrate the shell in order to ascertain the condition of the heart of the pole. Whether any one on behalf of the city or on behalf of the company made any such examination, within a reasonable time, as was needful to ascertain its condition, is a question for your consideration. In putting up the poles in the street, it was undoubtedly a duty resting upon the city, and upon the company which erected them, to examine them from time to time, as often as may be necessary, to ascertain their condition. Decay in timber is natural. We all know what it is. We know it from the ordinary experience of our lives, and it is a circumstance of which all parties concerned in these matters are bound to take notice. They are required to know that timber will decay, and are required to make such examination and inspection from time to time as will determine and ascertain whether decay has taken place to such an extent as to render the timber unfit for use. If you are of opinion that the examinations, either of the electric company or by the city, were of a kind and character such as ought to have been made to ascertain the condition of the pole, and were, in fact, made by them, and that the defect in the pole, if any there was, was not discovered by such examination, then the city cannot be liable in this action. The only liability of the city with respect to the poles erected in this manner, when it was apparently safe on the outside when it was first put up, was to inspect from time to time to ascertain whether it had fallen into a condition which rendered it unsafe."

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In the latter part of the charge the jury was instructed that, unless there was negligence on part of the company, it would not be liable; that negligence would consist in a failure to inspect and examine the pole with sufficient care and diligence. And in the first part of the charge it was declared to be the duty of the company to take effectual measures to ascertain the condition of the pole; that the company was required to know that timber will decay, and was required to make such examination and inspection, from time to time, "as will determine and ascertain whether decay has taken place to such an extent as to render the timber unfit for use." It may be true, as is claimed on behalf of the defendant in error, that the court did not intend to impose upon the company a duty beyond that of exercising ordinary care in the maintenance of the poles forming part of its electric light plant; but the question is whether the jury would not naturally construe these instructions to mean that the company was bound to make such an examination and inspection from time to time as would determine and ascertain whether decay had in fact taken place. Giving the language used its natural import, it certainly does impose upon the company the duty of making such examination, from time to time, as will ascertain and determine whether the poles have become decayed; and it is then declared that a failure to make such an examination constitutes negligence on part of the company. The evidence in this case showed that the decay which affected the strength of the pole was not upon the surface, and therefore was not open to ordinary observation, and, applying the instructions given to the facts proven, the jury could only understand from the instructions given that the company was bound to make such an examination of the poles as would be effectual to discover decay existing underneath the surface.

In defining the liability of the city, the court charged the jury that if "the examination, either of the electric company or by the city, were of a kind and character such as ought to have been made to ascertain the condition of the pole, and were in fact made by them, and that the defect in the pole, if any there was, was not discovered by such examination, then the city cannot be liable in this action." No such instruction was given with reference to the electric company, and there seems no escape from the conclusion that the charge was faulty and misleading, in that it failed to properly define the duty resting upon the company with respect to the maintenance of the poles by it lawfully placed in the city streets, in that it was so phrased that the jury must have understood that the company was bound to make such an examination that all defects would certainly be discovered, instead of being bound to use reasonable and ordinary care in the supervision and inspection of the poles placed in the street. By this ruling it is not meant to relieve the company from a faithful performance of its obligations to the public. In all cases wherein telegraph, telephone, electric light and power and electric car companies obtain and exercise the privilege of erecting and maintaining poles, wires, lamps, and other appliances in the public streets, they are bound to know that the maintenance of such appliances in and about the highway may create

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dangers to persons exercising the primary and paramount right of passage along or across the same. The companies are not insurers of the safety of the public against all dangers arising from the lawful placing in the street of the appliances pertaining to the business carried on by the companies; but they are bound to know the dangers which may naturally be caused by such use of the streets, and to guard against the same by the exercise of all the foresight and caution which can be reasonably expected of prudent men under such circumstances. If the court, in its instructions, had not overstepped this line in defining the obligation resting upon the electric company, we would not feel compelled to hold that error had been committed; but, as we view it, the court used language which the jury might well construe to mean that practically the company was bound to make such an examination of its appliances as would certainly secure a discovery of all hidden defects therein, which extends the duty resting upon the company beyond the limit which the law imposes upon the company.

It is also assigned as error that the court charged the jury that if Blake, who was an employé of the company, made an examination of the pole, and discovered its rotten and unsafe condition, this would be notice to the company, whether he communicated this knowledge to any officer of the company or not. Blake was called as a witness for the defendant in error, and he testified that he was in the employ of the electric company as a lamp trimmer, it being his duty to trim the lamps, report the "outs," put in carbons, and to report anything that looked bad,—to report any trouble. He further testified that, some 10 or 15 days before the pole fell which injured Miss Sherret, he examined the pole with a screwdriver, and found "that the screwdriver went in pretty easy, and showed that it [the pole] was pretty rotten," and that he was led to make this examination from seeing the pole "wriggling." He further testified that he notified Mr. Sheridan, a storekeeper of the company, of the fact he had discovered. Mr. Sheridan, being called as a witness, denied receiving such report or notice from Blake. Mr. McSparrin, the line foreman of the electric company, and Mr. Barker, the superintendent, both testified that it was Blake's duty to report any defects he discovered either to the foreman or the superintendent, and both witnesses denied receiving any report of the defect in the pole from him. The court instructed the jury that, if they found from the evidence that Blake did in fact examine the pole and discover the unsafe condition thereof at the time he stated in his testimony, this would be notice to the company, regardless of the question whether he made a report thereof to any other employé or officer of the company, and this ruling is assigned as error.

In Thompson on the Law of Corporations (volume 4, § 5195) the rule is stated to be to the effect that, in order to bind the principal, the notice must be communicated to one whose duty it is "to act for the principal upon the subject of the notice, or whose duty it is to communicate the information either to the principal or to the agent whose duty it was to act for him with regard to it." Counsel for the electric company, in the brief submitted, state their view of the rule in the

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following terms: "The general rule with reference to the question of notice is that notice to the agent is notice to the principal, if the agent comes to a knowledge of the facts while he is acting for the principal; but this rule is limited by the further rules that notice to the agent, to bind the principal, must be within the scope of the employment,"—and cite in support thereof the cases of The Distilled Spirits, 11 Wall. 356, and Rogers v. Palmer, 102 U. S. 263. In the former case it was said that "the general rule that a principal is bound by the knowledge of his agent is based on the principle of law that it is the agent's duty to communicate the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty"; and in the latter case it was held that knowledge obtained by an attorney when conducting a case for a client was imputable to the latter.

As already stated, Blake testified that it was his duty to report anything wrong or any trouble he discovered about the poles or wires of the company; and none of the witnesses for the electric company deny this fact, but, on the contrary, McSparrin and Barker, the line foreman and superintendent, both testify that it was Blake's duty to report to them any defects he might discover; and thus it was made plain that it was Blake's duty to take notice of defects in the plant coming under his observation, and to report the same when discovered; and therefore, within the doctrine of the authorities cited, the court was justified in instructing the jury that knowledge acquired by Blake of the defective condition of the pole, when he was going his rounds as an employé of the company, would be imputable to the company, because it was proven beyond dispute that it was his duty to take notice of defects, and, noticing them, to make report thereof.

A number of errors are assigned upon the action of the court in permitting testimony to be given with respect to the mental and physical condition of the defendant in error prior to the accident, and her condition after the injury; but we find no error therein, and it is not necessary to discuss them at length.

Exception is also taken to the ruling of the court upon the defense interposed of contributory negligence, which was to the effect that there was no evidence sustaining the defense. The charge of negligence on part of defendant in error was based upon the fact that, when she attempted to cross the street at the time of the accident, she did so diagonally, thus leaving the crossing usually followed by pedestrians; it being claimed that, had she been upon the crossing proper, she would not have been struck by the falling pole and wires. To maintain the defense of contributory negligence under these circumstances, it would be necessary to hold that the defendant in error had no legal right to cross the street diagonally, and that she was a trespasser in thus going upon it. In support of this contention, counsel for plaintiff in error cite a number of cases wherein it was held that it was a question for the jury to determine whether the party injured was negligent in the use made of the street or highway; but these are cases wherein the charge of negligence against the defendant corporation was a failure to keep the sidewalk in prop-

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er condition, in that some defect existed in the pathway itself, but it appeared that the usually traveled part of the street was in proper condition, and the injury had been occasioned by the traveler going outside of this part of the street. In this class of cases there is usually a choice given to the traveler to use the usually traveled and safe part of the highway, or to go upon the part which may be less safe; and then it is for the jury to say whether it was negligence to use the latter. In this case, as the trial court stated to the jury, when defendant in error started to cross the street, there was nothing in the surroundings which would charge her with notice that she incurred greater danger in crossing diagonally, and therefore there was nothing on which to base the charge of contributory negligence other than the fact that she crossed diagonally; and certainly this would not sustain the charge of contributory negligence, unless it be true that pedestrians have no right to cross a public street except at right angles and at places ordinarily used as a crossing. The use of the public streets between crossings is not limited solely to animals and vehicles, but may be used by footmen, due caution being exercised. Elliott, Roads & S. 622; Moebus v. Herrmann, 108 N. Y. 349, 15 N. E. 415.

The only other error assigned which needs consideration is based upon that part of the charge upon the rule of damages which was given in the following words:

"If she is under further disability, if these injuries are permanent in their character, so that she will not be able hereafter to resume her occupation, or, resuming it, cannot perform the service as efficiently as before, she is entitled to compensation in the degree in which she loses the power to earn money. So that, if you think that her powers are permanently impaired, that she will not hereafter be able to carry on her occupation as a school teacher, for the length of time for which she is withdrawn from her occupation she is entitled to such money as she could earn during that time, whether it be one year or more."

In effect, the jury were instructed that defendant in error was entitled to compensation for the past loss of time, resulting from the injury,—that is, to the compensation she would have earned as a school teacher; and, further, that, if the jury found that the injuries received would impair her ability to carry on her occupation as a school teacher in the future, she would be entitled to the salary she would have earned for the year or years she was disabled from pursuing her occupation. In cases wherein the evidence shows that the injury received will affect the ability of the party in the future to earn money, compensation must be made therefor; but the rule is not that the jury must determine the number of years that the disability will continue to exist, and then multiply this number by the yearly compensation the party has earned in the past. Damages for future losses in cases of this kind are not susceptible of computation by a strictly mathematical calculation. Evidence may be given of the age of the party injured, the probable duration of life, the effect the injury has had upon the ability of the person to earn money, of the probability that the injurious effect on the ability to earn money will continue in the future, either during life or for a lesser period, and of the business or occupation in which the person was en-

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gaged, and the compensation, whether by wages, fees, by a fixed salary or profits that resulted therefrom; and, from the facts thus proven in evidence, it is for the jury to award such fair sum as will, in their judgment, compensate the party for the decreased or destroyed ability to earn money in the future, due allowance being made for the contingencies and uncertainties that inhere in such matters. Railroad Co. v. Putnam, 118 U. S. 545, 7 Sup. Ct. 1; Railway Co. v. Needham, 10 U. S. App. 339, 351, 3 C. C. A. 129, 148, and 52 Fed. 371, 378. We are of the opinion that the charge of the court on this subject is open to the criticism that the jury would naturally infer therefrom that they must compensate the defendant in error for this future loss by allowing her the yearly compensation she had earned as a teacher for the length of time they deemed the disability would continue, thus assuming that, if this accident had not happened, the defendant in error would certainly have continued to teach at that rate of salary for her lifetime, or for the length of time the jury determined the injury would continue to affect her ability to earn money; and, as already said, this is not a correct statement of the rule to be observed by the jury in estimating damages of this nature.

For these reasons, the judgments rendered must be reversed, and the case be remanded for a new trial as to both the city of Denver and the electric company.

THAYER, Circuit Judge (dissenting). I am not able to concur in all the propositions considered and decided in the foregoing opinion. If a city authorizes a telegraph, telephone, or electric light company to erect a tall wooden pole, burdened with wires, on one of its public thoroughfares, it is affected with knowledge, from the very nature of the structure, that, in course of time, it will decay, and become dangerous to those who have occasion to use its streets. I am of opinion, therefore, that a municipality which authorizes such poles to be erected on its streets is under an obligation to the public to see that they are examined in a proper manner and at reasonable intervals, either by its own agents or by the persons or corporations whom it has authorized to erect them, and that the duty of inspection does not rest exclusively upon the latter, as the opinion of the majority seems to hold. Moreover, I do not understand that the charge of the trial judge, when considered altogether, imposed upon the electric light company the duty of exercising more than ordinary care in the matter of inspecting its poles. From the fact that the jury were instructed very pointedly that there could be no recovery against either of the defendants unless negligence on their part was proven, it is apparent, I think, that the trial judge did not entertain the view, or intend to convey the idea to the jury that the electric light company was bound at all hazards to see that its poles were in a safe condition. Considered as an entirety, the charge on this branch of the case meant, I think, that the electric light company was required to adopt a proper method of examining its poles, —one which would be liable to develop any interior rottenness,— and to examine them at reasonable intervals. This direction, in my judgment, was substantially correct.

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(88 Fed. 237.)

WILLIAMS et al. v. LYMAN.

(Circuit Court of Appeals, Eighth Circuit. June 20, 1898.)

No. 1,034.

1. PRINCIPAL AND SURETY—OFFICIAL BONDS—NEGLIGENCE OF OBLIGEE.
Neither the negligence nor failure of an obligee in an official bond, in the discharge of some duty to a third party, nor his negligence or laches in enforcing a compliance with its condition, will release the sureties. Nothing less than the breach of a covenant which the obligee has made, or connivance at the principal's breach of the bond, or knowledge of such breach, and a continuance of his employment without communicating the fact to his sureties, or such a willful shutting of the eyes to the evidences of the breach as warrants the inference of connivance, will have that effect.

2. SAME.
Mere neglect of an internal revenue collector to comply with the laws and regulations requiring him to frequently examine and verify the accounts of his deputy, and see that he faithfully discharges his duty, will not release the sureties on the deputy's official bond from liability for defalcations, which a strict performance of these duties might have prevented.

In Error to the Circuit Court of the United States for the District of Utah.

This was an action at law by Ambrose W. Lyman against P. L. Williams, George Cullins, and Sidney W. Darke, as sureties on the official bond of Richard H. Cabell, as a deputy internal revenue collector. There was a verdict for plaintiff in the court below, and judgment was entered thereon, to review which the defendants sued out this writ of error.

E. B. Critchlow and George Sutherland, for plaintiffs in error.
Franklin S. Richards, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. This case presents but a single question, and it is this: Is negligence or laches by an obligee in the discharge of his duties to a third person, or in the enforcement of his claims against the principal in a bond, a release of the obligation of the sureties thereon? This question arises in this way: On January 24, 1894, Ambrose W. Lyman, the defendant in error, was the United States internal revenue collector for the district of Montana. He appointed one Richard H. Cabell one of his deputies, and on that day Cabell as principal, and the plaintiffs in error as sureties, executed a bond to the defendant in error conditioned for the faithful discharge of his duties by Cabell. Between the date of that bond and February 23, 1897, Cabell misappropriated moneys of the United States which came into his hands as deputy collector to the amount of about $8,000. Lyman, the obligee in the bond, brought this action to recover his loss on account of this defalcation. The plaintiffs in

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error answered, and the case was tried by a jury, which returned a verdict in favor of the defendant in error.

The only error of which complaint is made is that the court below struck out the sixth paragraph of the answer, with leave to the plaintiffs in error to amend it by adding allegations of fraud and connivance. This paragraph pleaded two defenses. The first was that, under the laws of the United States and the rules made by the secretary of the treasury and the commissioner of internal revenue thereunder, it was the duty of the defendant in error to frequently and personally examine and verify the accounts of Cabell, to diligently and carefully supervise his discharge of the duties of his office, and to see that he faithfully performed them; that the defendant in error entirely neglected to do these things; and that the misappropriation and defalcation of Cabell would not have occurred if Lyman had faithfully and diligently discharged his duties. The second defense was that the defendant in error knew of the misappropriations of Cabell while they were in progress, but failed to notify the sureties thereof, and was guilty of neglect so gross and inexcusable that it operated as a fraud upon them. The latter defense is not before us for consideration, because the plaintiffs in error so amended their answer after the sixth paragraph was stricken out that they were permitted to introduce evidence upon the trial in support of this defense, and the court charged the jury that, if the defendant in error had any notice or knowledge of the defalcation of Cabell, it was his duty to immediately discharge him, or to communicate the fact to his sureties as soon as he heard it, and that, if he failed to do so, he could not recover on the bond, although mere inattention or negligence on his part, without knowledge, would not defeat the action. The only question, therefore, for our consideration, is whether or not the negligence of Lyman released the sureties.

It is earnestly contended that since the laws and regulations under which the commissioner and his deputy were acting required the former to diligently supervise and inspect the accounts and acts of the latter, and since such a supervision and inspection would have brought the latter's defalcations to light and might have prevented the larger part of them, the sureties on his bond had a right to rely upon the faithful discharge of these duties by this collector, and that they ought not to be compelled to pay for losses that probably would not have been sustained if the obligee in their bond had been diligent and faithful. It may be conceded that if this collector, in consideration of the execution of the bond, had covenanted with these sureties that he would diligently supervise and inspect the acts and accounts, and compel the faithful discharge of the duties imposed upon his deputy, and had then made a breach of his agreement, the sureties would have been released from their obligation. This proposition rests upon the rule that a breach of a contract by one of the parties to it releases the other from further performance. It may be conceded, also, that sureties for a deputy or a servant are released from liability for subsequent delinquencies if the employer connives at his defalcations, or if he becomes aware of them, and permits his deputy or servant to continue in his employment, without communicating

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his knowledge to the sureties. The reason is that the duty to act in good faith towards those in contract relations with them rests upon all men, and a concealment of such defalcations, a failure to notify the sureties of them as soon as discovered, or to immediately discharge the defaulter, or a connivance at them, is both a violation of that duty and a fraud upon the sureties. Phillips v. Foxall, L. R. 7 Q. B. 666; Burgess v. Eve, L. R. 13 Eq. 450, 458; Gradle v. Hoffman, 105 Ill. 147, 155. Perhaps a willful shutting of the eyes to evidences of fraud, dishonesty, or embezzlement on the part of the servant—a negligence so gross as to warrant the inference of connivance—might have the same effect, because such willful ignorance would work a like fraud on the sureties. But there must be some violation of a covenant with, or some breach of a duty to, the sureties to work a release of their obligation. Was there anything of this character in the failure of the collector to supervise and inspect the acts and accounts and to diligently enforce the discharge of the duties of his deputy, as required by the acts of congress and the regulations of the treasury department? He made no agreement with these sureties that he would comply with these laws and regulations. The laws were not enacted nor were the regulations adopted in the interest, or for the benefit, of these sureties. The acts of congress were passed, and the rules of the treasury department were established, for the benefit and protection of the United States, and for their benefit and protection alone. The plaintiffs in error cannot, therefore, base any cause of action or defense upon these laws and regulations alone, because Lyman owed the duty of obedience to them to the United States only, and they alone could recover damages for the breach of that duty. The failure to discharge a duty to the complaining party, and resulting injury to him, are indispensable elements of an action or defense on the ground of negligence. Reynolds v. Railway Co., 32 U. S. App. 577, 586, 16 C. C. A. 435, 440, and 69 Fed. 808.

Lyman, then, owed no duty to the sureties by virtue of the laws and regulations. Did the execution of the bond impose any duty upon him to comply with these laws and regulations for the benefit of the plaintiffs in error? They were in force when the bond was executed. They required regular, prompt, and correct accounts and vouchers, the careful preservation and prompt payment of the moneys of the government to the collector, and the faithful discharge of all his duties from the deputy, Cabell, as much as they called for supervision, inspection, and diligence by the collector, Lyman. If Cabell had complied with the laws and regulations, no negligence of Lyman—no failure on his part to discharge his duties—could have entailed any loss upon the sureties. When this bond was made, these sureties came to Lyman, and said, in effect, "If you will appoint Cabell your deputy, we will guaranty that he will comply with the laws and regulations which govern that office, and that he will faithfully discharge its duties." Lyman appointed him, and in consideration of that appointment these sureties gave the guaranty,—they executed this bond. Cabell failed to fulfill the guaranty; he broke the condition of the bond. The contract which his sureties made with the collector was that they would see that his deputy, Cabell,

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faithfully discharged his duties. They failed to do this. Is it any defense to an action on this contract that the collector or any other party failed to do the very thing which these sureties had agreed to do for them? Is it any defense to such an action that the collector was negligent in the discharge of a duty which he owed to the government, and that, if he had faithfully and carefully discharged that duty, the failure of these sureties to perform their contract—their failure to see that this deputy discharged his duties—would have caused them less loss? These questions must be answered in the negative. The contract was not that these sureties would guaranty the faithful discharge of the duties of this deputy if the collector supervised, inspected, and enforced his performance of them, or if he faithfully discharged his duties to the government or to any other third party. The bond contained no such conditions. Its purpose and effect were rather to relieve the collector of care concerning Cabell's actions and to cast that burden upon his sureties. The contract of suretyship is not that the obligee will see that the principal performs its condition, but it is that the surety will see that he performs it. Nelson v. Bank, 32 U. S. App. 554, 571, 16 C. C. A. 425, 435, and 69 Fed. 798. If the principal fails, and loss ensues, the laches or negligence of the obligee constitutes no defense for the surety, because by his contract he takes upon himself the primary duty of watchfulness and care. If the deputy in this case was late in the presentation of his accounts, and lax in the discharge of his duties, and if care and diligence would have discovered the beginning of his misappropriations and would have prevented his subsequent delinquencies, the burden was on those who guarantied his acts to exercise that care, to discover those defalcations, and to demand his removal. If they failed to be careful, if they failed to discover the misappropriations, and to demand the removal of their principal until after loss had resulted from his defalcations, their contract was that they would pay that loss. Neither the negligence nor failure of an obligee in a bond in the discharge of some duty to a third party, nor his negligence or laches in enforcing a compliance with its condition, will release the sureties from their obligation. Nothing less than the breach of a covenant which the obligee has made, or connivance at the principal's breach of the condition of the bond, or knowledge of such breach, and a continuance of his employment without communicating the fact to his sureties, or such a willful shutting of the eyes to the evidences of the breach as warrants the inference of connivance, will have that effect. Mactaggart v. Watson, 3 Clark & F. 533; U. S. v. Kirkpatrick, 9 Wheat. 720, 735; Tapley v. Martin, 116 Mass. 275; Board v. Otis, 62 N. Y. 88, 92; U. S. v. Witten, 143 U. S. 76, 79, 12 Sup. Ct. 372; Water Co. v. Parker (Cal.) 35 Pac. 1048, 1051; Bostwick v. Van Voorhis, 91 N. Y. 353, 361; Pacific Fire Ins. Co. of New York v. Pacific Surety Co. of California (Cal.) 28 Pac. 842; Bank v. Brownell, 9 R. I. 168. The judgment below is affirmed.

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(88 Fed. 243.)

FRED J. KIESEL & CO. v. SUN INS. OFFICE OF LONDON.

(Circuit Court of Appeals, Eighth Circuit. June 20, 1898.)

No. 1,027.

1. FIRE INSURANCE—CONSTRUCTION OF POLICY.
A policy on goods in a warehouse contained a clause which declared that "if a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." The building fell, and the goods were destroyed by fire; but whether the fall was caused by the fire, or by a gale of wind, was the matter in issue. Plaintiff requested a charge that, if the building or goods were on fire before the building fell, the company was liable, even though it would not have fallen but for the wind. *Held*, that the court properly rejected this request, and correctly charged that, if the fall was caused by the fire, the company was liable, but, if it resulted from some other cause, it was not.

2. SAME.
While a policy which is ambiguous or of doubtful meaning should be construed most strongly against the insurer, yet, if its terms are clear and unambiguous, they are to be taken in their plain, ordinary sense, and no construction is necessary.

3. APPEAL AND ERROR—QUESTION NOT RAISED BELOW.
A question which was not called to the attention of the court below by any objection or request for instructions will not be considered on appeal or writ of error.

4. OPINION EVIDENCE—WHEN ADMISSIBLE.
There is a recognized exception to the general rule requiring a witness to state facts, and not conclusions, which permits him to state his inference or opinion from facts he sees or knows, when he draws it from so many minor details that it is impossible to state them so that a jury could deduce a just inference from his narrative. But on an issue as to whether a building containing insured goods fell as the result of fire, or was blown down by a high wind, *held*, that the court committed no error in refusing to permit witnesses, who testified that they saw the roof on fire, and had seen other buildings on fire before, to give their opinions as to whether it was still standing when they saw it burning.

5. SAME.
The general rule that witnesses should state facts, and not conclusions, should be strictly followed; and, whenever it is doubtful whether a case falls under the rule or one of its exceptions, the wise course is to place it under the rule.

In Error to the Circuit Court of the United States for the District of Utah.

A. R. Heywood (Hugh A. Tait, on the brief), for plaintiff in error.
T. C. Van Ness, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. This writ of error challenges a judgment for the defendant in error, the Sun Insurance Office of London, an insurance corporation, in an action brought against it by the plaintiff in error, Fred J. Kiesel & Co., a corporation, on a policy of fire insurance upon merchandise that was situated in a warehouse at Ogden, in the state of Utah. One of the clauses of this

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policy reads: "If a building, or any part thereof, fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." The complaint of the plaintiff contained the usual allegations of the issue of the policy, the destruction by fire of the merchandise insured, the proof of the loss, and a demand for its payment. In its answer the defendant denied that the goods were destroyed by fire, and that proper proof of loss was made, and then averred that the building in which the merchandise was contained fell, not as a result of fire, but as a result of wind, before either the building or the goods within it were destroyed or injured by fire. When the case came to trial, the defendant stipulated that, if it was liable at all, it was liable for the full amount of the policy, and that the proof of loss was sufficient in that event, but "did not admit that it was liable, but, upon the contrary, alleged and claimed and stood upon the proposition that in truth the building was blown down by a gale of wind on the night of the 18th of September, and that, after the building had been blown down, a fire started in the débris, and destroyed to some extent, the contents; that the only real issue to be tried was whether or not the loss occurred from fire,—that is, whether the building first caught fire, which resulted in the destruction of the building and its contents, or whether it fell before the fire began." This issue was tried by a jury for five days. Evidence was introduced, on the one hand, tending to show that the warehouse was on fire, and that the flames were breaking through its roof while every part of it was still standing; and, on the other hand, that material portions and substantially all of the warehouse had fallen from a cause other than fire, and unconnected with fire, to wit, from a gale of wind, prior to the occurrence of fire on the goods insured or on the building. The principal complaint in the case is: That at the close of the trial the court below refused to give to the jury the following instruction, which was requested by counsel for the plaintiff: "If you believe from the evidence that the fire had originated, and that the building or any portion of the insured goods therein contained was on fire and burning, before the building or any part thereof fell, your verdict should be for the plaintiff, notwithstanding you may find from the evidence that subsequently the building or some substantial part thereof fell, and that the same would not have fallen but for the wind which was blowing at the time." That it charged them on this subject in these words: "If this building, or any substantial part thereof, fell before the fire, or before any portion of the merchandise insured (and this policy is on the merchandise within the building, and not on the building itself), before any portion of that merchandise was injured by fire, and it so fell, not as the result of the fire, but as the result of something else, your verdict should be for the defendant in this case, and not for the plaintiff." And that when counsel for the insurance company, at the close of the charge, excepted to this portion of it, and said, "As I understand the charge of the court, no matter to what extent the building was burning, if the goods were not on fire, no liability would attach," the court turned to the jury, and further charged them in this way:

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"Perhaps, gentlemen, I did not explain fully what I meant on that subject. If that building fell, even after the fire had originated, but fell from a cause distinct from the fire,—in other words, if the fall was not caused by the fire,—and if at the time it fell the goods had not caught fire, and had not been damaged by fire, the defendant would not be liable in this case. If, on the other hand, the goods—and the goods and merchandise only were insured—in the building, if those goods had been damaged by fire or had caught fire prior to the falling of the building, you will find for the plaintiff."

It is plain from the request of the plaintiff's counsel, which we have quoted, and from the instructions given by the court, that the only question of law at issue between court and counsel was whether or not the defendant was liable under its policy in case the building, or a substantial part thereof, fell from some other cause than fire after fire had attacked it, and before any of the goods insured were burned. No words occur to us more apt, terse, and expressive than those contained in the policy with which to answer this question: "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." If the building falls before the goods insured are damaged by fire, and if the fall is not caused by fire, from that instant the insurance ceases. The purpose of parties to an insurance policy in making their contract is to indemnify the insured against all destruction or damage caused by fire, but to give no indemnity against any destruction which resulted from other causes. Naturally, the dominant thought throughout the entire agreement, and hence the key to its interpretation and the measure of the liability of the company under it, is the cause of the destruction or damage. Generally speaking, if that cause is fire, there is liability. If fire is not the cause, there is no liability. In the particular clause in issue in this case, the same purpose controls, the same key interprets, the same test determines the liability. If the fall of the building was caused by fire, then the defendant was liable, whether the goods insured were burned before or after the fall; but if the fall occurred before the fire attacked the goods, and if that fall was caused by an earthquake, by a waterspout, by a cyclone, or by any other cause than fire, the express agreement was that, when the fall occurred, the insurance ceased, and there was no liability. If the building was on fire, and if it would not have fallen without the fire, its fall might well be said to have been the result of the fire; but if it was on fire, and if it would have fallen by the force of the wind if there had been no fire, then its fall could not be said to have been the result of the fire, and the defendant was not liable. Herein was the fatal defect in the instruction asked by plaintiff's counsel. They failed to appreciate the fact that the cause of the fall was the test of the liability. They requested the court to charge the jury that if the building was on fire, and would not have fallen but for the wind, the defendant was liable, when, by the express terms of the contract, it was not liable unless the warehouse fell as the result of the fire; and inasmuch as it might have been on fire, and yet might have fallen from the wind if there had been no fire, this instruction

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was erroneous. If they had asked a charge that the defendant was liable if the building would not have fallen but for the fire, that instruction would have been in accord with the terms of the contract, and would undoubtedly have been given. But when they asked that the defendant be held although the fall resulted from the wind, regardless of the question whether it resulted either directly or indirectly from the fire, they attempted to evade and escape from the plain reading of the agreement. The court below perceived this mistake, and correctly charged that, if the fall was caused by the fire, the insurance company was liable, but that if it resulted from some other cause it was not.

In reaching this conclusion, we have not overlooked the customary appeal of counsel in insurance cases to the rule that, where the terms of a policy are ambiguous or of doubtful meaning, its words should be construed most strongly against the company. Guarantee Co. v. Mechanics' Savings Bank & Trust Co., 47 U. S. App. 91, 101, 26 C. C. A. 146, 152, and 80 Fed. 766, 772. But it is equally well settled that "contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used; and, if they are clear and unambiguous, their terms are to be taken in their plain, ordinary, and proper sense." Imperial Fire Ins. Co. v. Coos Co., 151 U. S. 452, 463, 14 Sup. Ct. 379, 381. We are unable to discover anything ambiguous, doubtful, or obscure in the language of the clause over which this controversy rages. It was competent for these parties to fix the terms of their agreement. It is admitted that the contract was one for indemnity against loss caused by fire, and not against loss from other causes. It was for indemnity against such loss while the goods remained in the same state of hazard in which they were when the contract was made; and the policy contained various provisions limiting its duration and effect if a change in the situation of the goods took place which might enhance the danger of loss by fire, such as that the policy should be void if the insured obtained other insurance without notice to the company, or if the goods became incumbered by a chattel mortgage, or if the policy was assigned before loss, or if dynamite or certain other explosives exceeding in quantity 25 pounds were kept on the premises, or if a loss was caused by riot, theft, or by the neglect of the insured after a fire, or if the building containing the goods fell except as the result of fire. There was nothing unjust, unreasonable, or unfair in any of these stipulations. In making them, the parties merely exercised their rights of contract. They simply guarded more carefully and expressed more clearly their fixed intent to make a contract to indemnify the insured against loss caused by fire, and by fire only. Both parties well understood that this fire insurance company did not undertake to indemnify the plaintiff against loss caused by tornadoes, cyclones, waterspouts, earthquakes, or winds. Observation had taught, and experience had proved, that the débris of a fallen building is far more likely than the standing building to take fire and burn; and the clause here in issue, which exempts the company from liability from the contents of such a building from the instant of its fall, when that fall is not caused by fire, is consistent with the main pur-

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pose of the contract, is rational and fair in itself, and is expressed in words so apt, terse, and plain that attempts to elucidate their meaning are vain. Where the terms of a contract are so clear that exposition serves only to obscure, interpretation is futile and rules of construction have no application.

Several objections to this charge have been presented, which do not challenge the soundness of the main proposition of law which we have been considering, and they will now be briefly noticed.

It is claimed that the charge was erroneous because the defendant did not claim in its answer that it was free from liability if the building caught fire before it fell, and because at the opening of the trial it admitted "that the only real issue to be tried was whether or not the loss occurred from fire,—that is, whether the building first caught fire, which resulted in the destruction of the building and its contents, or whether it fell before the fire began." No objection of this kind, however, was made, and no exception to the charge on this ground was taken. No request was preferred to instruct the jury that the defendant, by its answer and stipulation, had admitted that it was liable if the building caught fire before it fell, and that question was never presented to the court below. It is therefore not here for our consideration. This is a court for the correction of the errors of the trial court only. Insurance Co. v. Miller, 19 U. S. App. 588–592, 8 C. C. A. 612, 614, and 60 Fed. 254, 257; City of Lincoln v. Sun Vapor Street-Light Co., 19 U. S. App. 431, 439, 8 C. C. A. 253, 258, and 59 Fed. 756, 761. Since this question was not presented to that court, and that court never considered or decided it, it certainly never committed any error regarding it, and there is nothing in this objection for us to consider or correct. Moreover, the stipulation at the opening of the trial was not made for the purpose of presenting an accurate statement of the single issue for trial, but for the mere purpose of naming that issue and separating it from others raised by the pleadings. The policy was introduced in evidence at the trial, and on its face it raised the question which the court considered. The case was tried five days, and at the close of that trial the court gave the law relative to this issue, and submitted it to the jury without any suggestion or warning from any one that it had been eliminated from the case either by answer or admission. Under these circumstances, the issue was not eliminated. It was pending, and a refusal to consider and submit it would have been erroneous.

It is said that the last sentence of the supplementary charge, which was, "If, on the other hand, the goods,—and the goods and merchandise only were insured in the building,—if those goods had been damaged by fire, or had caught fire prior to the falling of the building, you will find for the plaintiff," was, in effect, a charge that the jury could not find for the plaintiff unless the goods took fire before the building fell, and that this was an erroneous statement of the law. But no exception was taken to this sentence of the charge, and no request was made for its modification or extension; so that this question is not before us, and, if it was, it is plain, when the entire charge is considered, that there is no just ground for this criticism. No jury of ordinary intelligence could have listened to the instructions of the court

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in this case without perceiving that the question for them to determine was not whether or not the goods were burning before the building fell, but was whether the fall of the building was the result of fire or of some other cause.

It is assigned as error that witnesses who had testified that they saw the roof of the building on fire, and that they had seen other buildings on fire before, were not permitted to testify whether or not in their opinion the roof was standing when they saw it burning. It is conceded that this was not a proper subject for expert testimony, and that the general rule of evidence is that a witness must state the facts, and may not testify to his opinions. But it is claimed that the proposed testimony falls under the recognized exception to this rule that any witness may state his conclusion, inference, or opinion from facts he sees or knows when he draws it from so many minor details that it is impossible for him to state them so that the jury would have a fair opportunity to deduce a just inference, or to form a correct opinion from the narration or description he could give. Railroad Co. v. Rambo, 16 U. S. App. 277, 280, 281, 8 C. C. A. 6, 8, and 59 Fed. 75, 77; Yahn v. City of Ottumwa (Iowa) 15 N. W. 257. It is not difficult to state this exception, or to illustrate it with striking examples; but it is not always easy to correctly apply it in doubtful cases. Many instances readily occur to the mind which, from their very nature, fall clearly within the exception. A witness may give his opinion as to the identity of a person, as to his physical or mental condition, may testify that he was sick or intoxicated, or that he was pleased or angry or insane, because it is clearly impossible for him to describe to the jury the many, sometimes slight, yet sure, manifestations of the identity or state which he saw, so that they can have any fair opportunity to draw from them a correct conclusion. In cases of this kind a refusal to allow a witness to state his opinion would constitute a palpable error. But there are many cases so near the line between the rule and its exception that an appellate court should not be swift to reverse the rulings of the court below unless it is reasonably clear that a plain error of law has been committed. There is a wide difference in the ability of witnesses to describe what they have seen, and to narrate what they have heard. One witness may be able to make so graphic a word picture of a scene he has witnessed that those who hear it are in as good a situation to deduce a correct conclusion as he is; while another, who has observed the same incidents, may be utterly incapable of describing them, and can do nothing but state the impression or conclusion he drew from them. The trial court sees and hears each witness, and in doubtful cases is far better qualified than the court of appeals to determine whether a witness should be confined to the facts, or should be allowed to state his conclusions. In the case in hand, it does not appear to have been impossible—indeed, it does not seem to have been very difficult—for the witnesses to have so described the appearance of the burning roof that the jury could have drawn a correct conclusion from their description with reference to the question whether or not it was standing when they saw it burning. One of these witnesses testified that he saw the upper portion of the east wall from one end to the other

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standing; that he saw one-third of the easterly slope of the roof in place; and that the north two-thirds of this easterly slope was covered with fire and flames, so that he could not see the material of which it was composed. This witness could certainly have stated, as the facts were, either that the base of these flames was on the plane of the roof, or that on a portion of the roof their base was on this plane, and on another portion it was below it, and that the flames came through it as from the mouth of a crater; and from such a description the jury could easily have drawn the proper conclusion. The general rule that facts, and not conclusions, should be stated, is a wise and salutary one, and cannot be too strictly followed. It tends to prevent fraud and perjury, and is one of the strongest safeguards of personal liberty and private rights. Whenever it is doubtful whether a case falls under the rule, or under one of its exceptions, the wise course is to place it under the rule; and, in our opinion, the court below made no mistake in following this course in the case before us. The judgment below is affirmed.

(88 Fed. 253.)

STATON v. UNITED STATES.

(Circuit Court of Appeals. Eighth Circuit. June 20, 1898.)

No. 1,035.

1. DEFRAUDING UNITED STATES—FORGED AFFIDAVIT.
   One presenting accounts to the government cannot be convicted under Rev. St. §§ 5418, 5479, for forging the name of a justice of the peace to the affidavit attached thereto, unless it be done to defraud the United States.
2. SAME—INDICTMENT.
   An indictment charging that defendant forged the name of a justice of the peace to accounts presented by him to the government accounting officers, "with intent to defraud the United States," must be regarded as based on Rev. St. §§ 5418, 5479, and not on section 5421, which denounces the making, altering, forging, etc., of papers, for the purpose of "obtaining or receiving * * * from the United States or any of their officers or agents any sum of money."

In Error to the District Court of the United States for the Eastern District of Arkansas.

G. W. Murphy, for plaintiff in error.
Edward C. Stringer, U. S. Atty.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

THAYER, Circuit Judge. Ben B. Staton, the plaintiff in error, was indicted under an indictment containing two counts, in the district court of the United States for the Eastern district of Arkansas. The indictment on its face purported to have been framed on the provisions of sections 5418, 5421, and 5479 of the Revised Statutes of the United States. The first count of the indictment charged that said Staton, on July 3, 1894, in the Western division of the Eastern district of Arkansas, "did then and there willfully, unlawfully, wil-

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lingly, falsely, and feloniously make and forge a certain affidavit and writing to his quarterly postal account and return for the quarter ending June 30, 1894, to the auditor for the post-office department, which said affidavit and writing is in words and figures as follows, to wit." The alleged forged affidavit was then set out in hæc verba, the same being an affidavit which purported to have been sworn to before "M. H. Stokes, J. P.." and was in form and substance the usual affidavit which postmasters are required to affix or attach to their quarterly reports. The second count of the indictment charged the accused with the commission of a similar offense on October 2, 1894, in that he had attached to his quarterly return for the quarter ending September 30, 1894, a forged affidavit made before "M. H. Stokes, J. P." The second count, however, differed from the first count in that it further alleged that M. H. Stokes, justice of the peace, did not sign his name to said affidavit; that the name of the justice had been signed thereto by said Staton; and that the act was committed by the accused "with intent to defraud the United States, contrary to the form of the statute in such case made and provided." The first count of the indictment contained no allegations similar to those last aforesaid charging that the accused had signed the name of Stokes with an intent to defraud. On the trial of the indictment, the accused testified in his own favor, in substance, as follows: That while he did sign the name of "M. H. Stokes, J. P.," to each of the quarterly reports of date June 30 and September 30, 1894, yet that the name of the justice was so signed by direction of said justice because the latter was busy at the time, and did not wish to take the trouble to affix his official signature to the reports; that the returns were in all respects true and correct; and that the defendant had no purpose or intent to defraud the United States or to obtain money or credit to which he was not entitled.

The defendant requested the trial court to charge the jury in his behalf as follows: "If the items embraced in the returns or accounts were correct, and contained no false entry or claim, and there was no intent on the part of the defendant to obtain from the government something that he was not entitled to in the way of money or credit, he is entitled to an acquittal." But the court declined to do so, and thereupon charged the jury to the contrary of such request, and in substance as follows: That, even if the accused did have authority from Stokes to sign the latter's name to the jurats which were attached to the affidavits to his quarterly reports, yet, as a person cannot administer an oath to himself, the fact that the accused signed the name of the justice of the peace to the returns, and presented the same to the government, when he had not in fact sworn to them before the justice, constituted the crime of forgery, and that the jury should so find. No attempt is made by counsel for the government to support the action of the trial court in the respects last stated, under the provisions of sections 5418 and 5479 of the Revised Statutes, the same being two of the sections referred to on the face of the indictment, under which it purports to have been drawn. These sections in express terms provide that the making, altering, forging, or counterfeiting of the various instruments and writings to which those sections

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refer shall be an offense when done "for the purpose of defrauding the United States"; and inasmuch as the trial court in its charge altogether ignored the intent with which the acts complained of had been committed, and instructed the jury that the accused was guilty of the crime of forgery if he signed the name of the justice to his reports, even with that officer's consent, and subsequently presented the reports to the government, it is manifest that there was error in the charge if we regard the indictment as founded on the two sections of the statute last above mentioned.

It is contended, however,—and this seems to be the sole reason urged in support of the charge,—that the indictment was drawn under section 5421 of the Revised Statutes, and that inasmuch as the defendant admitted that he had intentionally signed the name of the justice of the peace to his reports, and subsequently presented the reports to the auditor of the post-office department, the question of intent was eliminated from the case, and no finding thereon by the jury was requisite. It is a sufficient answer to this contention to say that the indictment was not based on section 5421 of the statute, or, if it was the intention of the pleader to found it thereon, that it was insufficient. Section 5421 provides that "every person who falsely makes, alters, forges or counterfeits * * * any deed, power of attorney, order, certificate, receipt, or other writing, for the purpose of obtaining or receiving * * * from the United States or any of their officers or agents any sum of money, * * * shall be imprisoned," etc.; and neither count of the indictment in question charged, as it should have done if drawn under that section, that the act complained of was done for the purpose of obtaining from the United States a sum of money. Moreover, the second count of the indictment expressly charged that the act complained of was done "with intent to defraud the United States."

We think it clear, therefore, that the indictment must be regarded as based on sections 5418 and 5479 of the Revised Statutes, rather than on section 5421; that the element of intent was involved in the issue; and that the accused was entitled to have the jury determine, it being one of the necessary ingredients of the offense charged in the bill, whether he had been actuated with an intent to defraud the United States.

It results from these views that the judgment of the district court must be reversed, and the cause remanded for a new trial. It will be so ordered.

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(88 Fed. 256.)

BURROUGHS v. ERHARDT.

(Circuit Court of Appeals, Second Circuit. June 24, 1898.)

No. 104.

CUSTOMS DUTIES—MONEY DEPOSITED WITH COLLECTOR—RECOVERY BACK.

Money deposited with the collector as security (additional to that of the importer's bonds) for payment of duties assessed, and actually applied to the payment of duties, cannot be recovered back, in the absence of a protest, even if the duties were wrongfully assessed.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error sued out by the administratrix of plaintiff below to review a judgment of the circuit court, Southern district of New York, in favor of defendant below, the collector of the port of New York, upon a verdict directed in his favor by the circuit judge.

C. B. Barker, for plaintiff in error.

Arthur M. King, Asst. U. S. Atty., for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. It is practically not disputed that if the $6.000 in controversy was deposited with the collector to secure the payment of duties assessed upon plaintiff's merchandise, even though such duties may have been wrongly so assessed, it cannot be recovered back, since no protest was filed. The difficulty with the case is that, even upon the plaintiff's own evidence, this is precisely the purpose for which the deposit was made. Plaintiff testifies that it was deposited because the government officers "did not consider [his] bonds were sufficient to protect the government; they wanted additional security." The amended complaint avers that the deposit was made "as a guaranty of good faith in making entries for warehouse," and "as security to the United States against any loss in case the warehouse bonds were not sufficient to cover all the lumber." But the only object of the warehouse bond is to protect the government against failure to pay duties; the only possible loss consequent upon insufficient bonds would be a loss of duties. The bond is security placed in the hands of the government, from which, in the event of the importer's failure to pay duties assessed upon his goods, such payment may be obtained. The $6,000 in gold was manifestly deposited for a like purpose. We are unable to conceive of any theory upon which, assuming plaintiff's statements to be entirely accurate, a single dollar of it was to be paid for anything except duties. It was used up (except for the small balance returned) in making payments of duties assessed against plaintiff's goods, and, in the absence of any protest against the exaction of such duties, cannot be recovered back.

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(88 Fed. 258.)

WESTINGHOUSE AIR-BRAKE CO. v. GREAT NORTHERN RY. CO. et al.

(Circuit Court of Appeals, Second Circuit. June 24, 1898.)

No. 117.

1. FEDERAL COURTS—JURISDICTION IN PATENT CASES—WHERE SUITS MAY BE BROUGHT.
   The provision in the judiciary act of 1887–88 that no civil suit, of which federal courts have jurisdiction concurrently with the courts of the several states, shall be brought against any person in any other district than that whereof he is an inhabitant, does not apply to patent suits, exclusive jurisdiction over which is conferred by Rev. St. § 629, cl. 9. And hence, prior to the act of March 3, 1897, defining the jurisdiction of the federal courts in patent suits, a suit for infringement by a citizen of a state of the Union could be brought in any district where valid service could be made upon the defendant.
2. SAME—AMENDMENT AND REPEAL OF STATUTES.
   The act of March 3, 1897, defining the jurisdiction of the federal courts in patent suits, and authorizing the bringing of such suits in the district of which defendant is an inhabitant, or in which he "shall have committed the acts of infringement, and have a regular established place of business," did not repeal prior statutes, so as to oust the courts of jurisdiction in pending cases not falling within the jurisdictional limits prescribed in the new act.
3. PATENTS—ANTICIPATION—"SUGGESTIONS" IN PRIOR PATENTS.
   Prophetical suggestions in a foreign patent of what can be done, when no one has ever tested, by actual and hard experience and under the stress of competition, the truth of the suggestions, or the practical difficulties in the way of their accomplishment, or even whether the suggestions are feasible, are not to be accepted as showing that a subsequent patent, which has already been sustained by the courts as a meritorious one, is without actual invention.
4. SAME—AIR BRAKES.
   The Westinghouse patent, No. 376,837, for improvements in fluid pressure brake mechanism, *held* valid and infringed as to claims 1, 2, and 3.
5. SAME—PRELIMINARY INJUNCTION.
   A railroad company continuing to use infringing air brakes on large numbers of its cars for 3½ years after notice of an adjudication by a circuit court of appeals sustaining the patent, and declaring infringement, cannot complain, on the ground of hardship, of a preliminary injunction, which provides for a gradual removal of the infringing brakes.

This appeal is by the Great Northern Railway Company from an order of the circuit court for the Southern district of New York, which granted a preliminary injunction against the infringement by that corporation of claims 1, 2, and 3 of letters patent No. 376,837, applied for October 1, 1887, and issued to George Westinghouse, Jr., on January 24, 1888, for improvements in fluid pressure brake mechanism.

The bill of complaint was filed October 8, 1896, and the defendant filed pleas to the jurisdiction, which were overruled December 27, 1897. The order for an injunction pendente lite was granted April 1, 1898. The questions of the validity of claims 1, 2, and 3 of this patent, and of their infringement by the quick action triple valve which is used by the defendant, were before this court, and were decided on October 15, 1894. Westinghouse Air-Brake Co. v. New York Air-Brake Co., 11 C. C. A. 528, 63 Fed. 962, and 26 U. S. App. 248.

Simon Sterne and Wm. H. Kenyon, for appellant.

Frederic H. Betts and George H. Christy (J. Snowden Bell, of counsel), for appellee.

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Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The first question which arises upon this appeal is that of the jurisdiction of the circuit court for the Southern district of New York over the cause, so far forth as it relates to the appellant. The Great Northern Railway Company is a corporation organized under the laws of the state of Minnesota, and is a citizen of that state, and operates a line of railway from Duluth and St. Paul to the Pacific coast. It has an office in the city of New York, where its transfer books are kept and transfers of stock are made; and this part of its corporate business is attended to at said office by Edward T. Nichols, its secretary and assistant treasurer, who resides at Morristown, N. J. Service was made upon him in New York City, as secretary of the corporation. The complainant is a citizen of the state of Pennsylvania.

The appellant insists that, when the bill was filed, the only existing statute which prescribed and designated the proper district within which suits arising under the patent laws could be brought against a citizen of the United States was the first section of the act of March 3, 1887, as amended by the act of August 13, 1888 (25 Stat. 434), the last clause of which is as follows:

"And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant."

The question whether the circuit courts of the United States could take jurisdiction without the consent of the defendant, of suits of which the federal courts have exclusive jurisdiction, in any other district than the one of which the defendant was an inhabitant when the suit was brought, has been much discussed since the date of the act of March 3, 1887, but, for the present, must be considered as substantially settled by the dicta contained in the opinions of the supreme court in Re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, decided December 18, 1893, and in Re Keasby & Mattison Co., 160 U. S. 221, 16 Sup. Ct. 273, decided December 16, 1895.

If the clause of the section which has been quoted was an independent paragraph, and had no relation to the previous clauses of the same section, the contention of the appellant would have great force; but in the Hohorst Case it is regarded as so related to the preceding clauses that it must be considered as referring only to the jurisdiction of the circuit courts, which is concurrent with that of the several states. The earlier part of the section is as follows:

"The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states."

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The bill in equity in this case does not aver the sum or value of the matter in dispute, and the jurisdiction of the circuit court depends entirely upon the subject-matter. In regard to causes of that class, the supreme court says in the Hohorst Case, which was a suit by a citizen of New York against an alien corporation, for the infringement of letters patent of the United States:

"By statute in force at the time of the passage of the acts of 1887 and 1888, the courts of the nation had original jurisdiction, 'exclusive of the courts of the several states,' 'of all cases arising under the patent right or copyright laws of the United States,' without regard to the amount or value in dispute. Rev. St. § 629, cl. 9; Id. § 711, cl. 5. The section now in question, at the outset, speaks only of so much of the civil jurisdiction of the circuit courts of the United States as is 'concurrent with the courts of the several states,' and as concerns cases in which the matter in dispute exceeds two thousand dollars in amount or value. The grant to the circuit courts of the United States, in this section, of jurisdiction over a class of cases described generally as 'arising under the constitution and laws of the United States,' does not affect the jurisdiction granted by earlier statutes to any court of the United States over specified cases of that class. If the clause of the section defining the district in which suit shall be brought is applicable to patent cases, the clause limiting the jurisdiction to matters of a certain amount or value must be held to be equally applicable, with the result that no court of the country, national or state, would have jurisdiction of patent suits involving a less amount or value. It is impossible to adopt a construction which necessarily leads to such a result."

The Keasby & Mattison Case was a suit in equity between citizens of different states for the infringement of a trade-mark under the statute of March 3, 1881; and the bill alleged that the matter in dispute, exclusive of interest and costs, exceeded the sum or value of $2,000. The court hold that a suit for infringement of a trade-mark under the trade-mark act of 1881 was "one of which the courts of the United States have jurisdiction concurrently with the courts of the several states," and that it came within the provisions of section 1 of the act of August 13, 1888, and repeat the two grounds which governed the decision in the Hohorst Case, the second of which has been stated, and say emphatically that it is distinguishable from a trade-mark case in the essential particulars that "it was a suit for infringement of a patent right, exclusive jurisdiction of which had been granted to the circuit courts of the United States by clause 9 of section 629, and clause 5 of section 711, of the Revised Statutes, re-enacting earlier acts of congress, and was therefore not affected by general provisions regulating the jurisdiction of the courts of the United States, concurrent with that of the several states." This construction of the provisions of section 1 of the act of 1888 was very deliberately stated by the supreme court, had been apparently carefully considered, and, until it has been revised and altered by that court, is controlling upon us.

It follows that, inasmuch as jurisdiction of this class of cases does not depend upon inhabitancy, the defendant corporation "may be sued by a citizen of a state of the Union in any district in which valid service may be made upon the defendant." In re Hohorst, supra. Service was made upon the secretary of the company, who was in permanent charge of an office of the corporation in the city of New York, in which an important part of its corporate business was

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transacted; was made in accordance with section 432 of the New York Code of Civil Procedure (Tuchband v. Railroad Co., 115 N. Y. 437, 22 N. E. 360); and was a sufficient service upon the corporation (St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354; Société Foncière et Agricole des Etats Unis v. Milliken, 135 U. S. 304, 10 Sup. Ct. 823).

The appellants next assert that the act of March 3, 1897 (29 Stat. 695), devested the circuit court of any jurisdiction which it might have had when the suit was commenced. The statute is as follows:

"Chapter 395.

"An act defining the jurisdiction of the United States circuit courts in case brought for the infringement of letters patent.

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that in suits brought for the infringement of letters patent the circuit courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpœna upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought."

The act was passed about 15 months after the Keasby decision, and was obviously intended to add to the general statutes upon the subject of jurisdiction in patent cases a definition of the particular requisites for jurisdiction of such causes by the various circuit courts, and of the proper method of service of process upon a defendant in the district of which he was not an inhabitant. The object was to determine with precision the boundaries of jurisdiction, and to create a future method of service of process in patent causes against nonresident defendants, which had not theretofore been stated in a federal statute.

The appellant, however, says that the statute covered the subject of jurisdiction in patent cases, prescribed a new set of rules in regard thereto, and must be held to repeal former statutes. The circumstances of the cases and the statutes to which the appellant refers bear no similarity to those now in question. The statutes which, in the view of the supreme court, alone gave jurisdiction to circuit courts in patent cases, were very general. The new provisions were prospective, in accordance with the ordinary rule of construction when the language does not necessarily indicate that they are retroactive. Harvey v. Tyler, 2 Wall. 328. It is said, however, that the statute repealed former statutes, and that, therefore, the courts were ousted of jurisdiction in cases which were undetermined at the date of its approval, and in which the jurisdiction differed from the limits described in the new statute. Of course, it did not repeal the statute which gave the circuit courts exclusive jurisdiction of all cases arising under the patent laws. Bank v. Harrison, 8 Fed. 721. It did not repeal pre-existing remedies, and "is to be considered rather as a continuance and modification of old laws than as an abrogation of the old and the re-enactment of new ones." Treat v. Staples, 1 Holmes, 1, 5, Fed. Cas. No. 14,162; Wright v. Oakley, 5 Metc. (Mass.) 406.

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The question of infringement depends upon the correctness of the construction which was given to the patent in the New York Air-Brake Case, supra. The former opinion of this court was based upon the position that the improvement shown in patent No. 376,837 was a marked and successful advance upon the invention described in No. 360,070, and that the later patent was entitled to a broad construction. The appellant introduces British letters patent to George Westinghouse, Jr., No. 4,676, applied for March 29, 1887, accepted April 29, 1887, which describes the invention of letters patent of the United States No. 360,070, and which says:

"It is obvious that it [the stem of the emergency valve] might be worked as described by a separate piston in a cylindrical cavity communicating on the one side of the piston with the auxiliary reservoir, and on the other side with the train pipe."

It is said that this describes the appellant's valve, shows that the change from 360,070 (which was applied for November 19, 1886) to 376,837 was an obvious one, and, therefore, that the former conception of the inventive character of the improvements must be modified. The successful character of the invention described in the later patent has been universally recognized in the litigations upon it, by the witnesses on both sides, including Mr. Massey, the inventor of the valve which is the subject of this suit, and by the courts in the Boyden Brake Cases, 66 Fed. 997, 25 U. S. App. 475, 17 C. C. A. 430, and 70 Fed. 816; and its importance at the date of the invention, in view of the practical failure of the brake mechanism of the previous patent, in the tests upon long freight trains, cannot be doubted. The prophetical suggestions in English patents of what can be done, when no one has ever tested by actual and hard experience and under the stress of competition the truth of these suggestions, or the practical difficulties in the way of their accomplishment, or even whether the suggestions are feasible, do not carry conviction of the truth of these frequent and vague statements. The nature and character of the invention of 376,837 were, in the record heretofore before this court, put to rigorous tests by examination and cross-examination in court; and the result which was then reached is not shaken by merely a single sentence in the English patent.

The defendant has about 16,000 cars in the equipment of its system of railway, which covers a very large extent of territory, of which number about 3,200 are equipped with the infringing valves. The order provided that these valves should be removed during successive periods of 60 and 30 days, occupying 9 months in all. In October, 1894, the attention of the defendant was called by a general circular to the decision of the circuit court of appeals; and in May, 1895, its attention was particularly called to the infringement by a written proposition from the complainant for a purchase of its valves, and an indemnity against claims for infringement. It has paid no attention to the subject for about 3½ years, and it now thinks that it is a hardship to be prohibited from further infringement. The subject of the propriety generally of a preliminary injunction against the user of infringing mechanism has been fully considered by this court in Allington v. Booth, 24 C. C. A. 378, 78 Fed. 878; and the appel-

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lant discloses no peculiar equities which ought to induce a withholding of the injunction. It has been a deliberate user of a large number of valves, and has preferred to run the risk of an injunction than to displace its present equipment. The order of the circuit court is affirmed, with costs of this court.

(88 Fed. 264.)

WICKELMAN v. A. B. DICK CO.

(Circuit Court of Appeals, Second Circuit. June 24, 1898.)

No. 98.

1. PATENTS—NOVELTY—ACCIDENTAL PRIOR PRODUCTION.
   Novelty is not negatived by a prior accidental production of the same thing, when the operator does not recognize the means by which the accidental result is accomplished, and no knowledge of them, or of the method of their employment, is derived from it by any one.
2. SAME—STENCIL SHEETS.
   The Broderick patent, No. 377,706, for a coated paper sheet for stencils, *held* to cover a novel and meritorious invention, and also *held* infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit in equity by the A. B. Dick Company against Frederick A. Wickelman for alleged infringement of a patent for stencil sheets. In the circuit court a decree was rendered for an account of profits and damages (74 Fed. 799), and afterwards the cause was heard on exceptions to the master's report, and such exceptions were overruled. 80 Fed. 519. From the final decree thereafter rendered the defendant has appealed.

F. A. Wickelman, pro se.

Richard N. Dyer, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. Error is assigned upon this appeal of a decree adjudging the validity of letters patent No. 377,706, granted February 7, 1888, to John Broderick, for coated paper sheet for stencil, and the infringement thereof by the defendant. The appellant insists that the court below should have held the patent void for want of novelty. The patent covers a meritorious invention. The subject is a transmitting printing sheet to be used as a stencil for duplicating upon other sheets the words or designs impressed upon it, but differing from a stencil in that the letters or figures are not cut out. In the ordinary stencil, loop letters such as O, D, Q, etc., cannot be perfectly formed, for, if completely cut out, the center is lost. The invention is especially valuable because it is adapted for use with a typewriting machine, and enabled for the first time a commercially useful, type-impressible stencil to be made, and thereby the duplication of a greater number of copies than can be transmitted by carbon sheets. The work done upon it is practically the equivalent of ribbon work, and resembles it so closely that it is diffi-

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cult to detect whether the prints made from it are not actually typewriter work, and the thousandth copy is as perfect, substantially, as the earlier copies.

In the prior art, stencil sheets for duplicating handwritings were made from waxed or gummed paper cut or perforated through the wax and the fibers of the paper. In some instances these sheets of paper, covered with wax, were placed upon a roughened plate, and when the letters were traced upon it the plate would abrade the sheet, causing minute perforations through which the ink could be transmitted. In others, ink of a peculiar acid was used to eat through the paper. And in others the writing was done by a notched or roughened wheel, which forced its way through the sheet. The wax coating commonly used was hard, and measurably brittle.

The patentee conceived the idea of employing a porous basic material for the sheet, which would not require to be cut or perforated, and coating it with a gummy or waxy substance, impervious to ink, of such a consistency that it could be displaced at the lines of impression so as to leave the inherent interstices in the paper exposed for the transmission of the ink. In his experiments with different kinds of basic materials he found the Japanese paper known as "yoshino" to be admirably adapted for the purpose in view, having sufficient porosity, thinness, and toughness to meet all the necessary conditions. This kind of paper had never previously been employed for stencil sheets. Among the coating substances which he tried he found that paraffine of about 120° Fahrenheit, fusion point, was suitable. In describing the way of practicing his invention he states that such paper and such a coating material are preferentially to be used in preparing the sheet. The patent, however, is not limited to the use of these constituents in preparing the sheet. The specification points out that any sheet of the requisite porosity, thinness, and toughness may be used, and may be coated with any gummy or waxy substance of a consistency that will yield upon pressure so as to expose the interstices of the basic material at the lines of impression without abrasion. The claims are as follows:

"(1) A transmitting printing sheet consisting of a thin, porous sheet through which ink is readily transmitted, such as Japanese dental paper or yoshino, filled or coated with a substance impervious to ink, as paraffine, substantially as described.

"(2) A transmitting printing sheet consisting of a thin porous sheet through which ink is readily transmitted, such as Japanese dental paper or yoshino, filled or coated with a substance impervious to ink, as paraffine, and having this filling or coating removed at the points or lines of printing, substantially as described, for the purpose specified.

"(3) A prepared sheet for stencils, consisting of a sheet of Japanese dental paper or yoshino, coated with a substance impervious to ink, substantially as described."

We entertain no doubt that, if the patentee was the first to make a transmitting sheet which, by reason of the peculiar characteristics of the basic material, and of the coating, was new and useful, what he did involved invention, and entitled him to a patent. Inventive thought was involved in the conception that materials could be employed that would dispense with cutting or puncturing instrumentalities altogether. Even if what he did was merely to employ a

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basic material differing in the degree of porosity and toughness, and a coating differing in the degree of softness, from that which had been previously used, he accomplished thereby a new result. Each of these modifications was necessary to successfully introduce the new principle, which differentiated his production from the stencil sheets of the prior art.

The only evidence in the record which tends to negative the novelty of the invention is the testimony relating to the waxed paper made and sold by the defendant prior to May 20, 1886, the date of Broderick's application for the patent. Since 1871 the defendant had been engaged in the manufacture and sale of waxed paper for use as waterproof wrappers upon candy, meat, and other articles. In that business he used many different kinds of paper, and waxed them with coatings of different consistencies, including paraffine at different degrees of fusion. He testifies that he coated with wax, including paraffine ranging from 110° to 140°, every kind of paper he could find in the market, from the lightest tissue to packing paper; and that in 1878 and subsequently he used considerable Japanese paper, some of which was yoshino. Until after the date of the application for the patent in suit, he had never attempted to make any wax paper for stencil sheets, and the idea of its adaptability for that use had never occurred to him. Early in 1887 the complainant, whose officers were experimenting in the production of sheets for manifolding typewriting, employed him to make stencil sheets. After he had tried crepe lisse, nainsook, mull, and tarletan, and different kinds of paper, with coatings of various consistencies, Mr. Dick instructed him to try a soft wax, and he then made coatings of a greater degree of softness. During these experiments, at his suggestion, a West India tissue paper was tried. No suitable paper was found, however, until some time in the summer of 1887, when, at the suggestion of Mr. Dick, yoshino was tried, and was successfully coated. This evidence indicates quite persuasively that the defendant was not conversant with yoshino paper. Assuming, however, that he had used it, and had coated it with soft paraffine, it is obvious that he had done so in ignorance of the characteristics of the paper and of the necessary consistency of the coating, and that the product, if capable at all of use for a stencil sheet, was an accidental product, which contributed nothing to the prior art of making such sheets.

In disposing of the defense in the court below, Judge Wheeler, speaking of the evidence for the defendant, said:

> "It falls short of showing satisfactorily, and beyond fair doubt, that he had actually ever waxed this kind of paper; and far short of so showing that he had ever made such blanks as these for stencils, or had, by waxing and shaping, made this kind of paper in the form suitable for such stencils."

In these observations we entirely agree.

The case is one for the application of the doctrine, well settled in the law of patents, that novelty is not negatived by a prior accidental production of the same thing, when the operator does not recognize the means by which the accidental result is accomplished, and no knowledge of them, or of the method of its employment, is derived

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from it by any one. Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co., 55 Fed. 307; Chase v. Fillebrown, 58 Fed. 377; Topliff v. Topliff, 145 U. S. 161, 12 Sup. Ct. 825; Tilghman v. Proctor, 102 U. S. 707, 711.

"The chance operation of a principle, unrecognized by any one at the time, and from which no information of its existence, and no knowledge of a method of its employment, is derived by any one, if proved to have occurred, will not be sufficient to defeat the claim of him who first discovers the principle, and, by putting it to practical and intelligent use, first makes it available to man." Andrews v. Carman, 13 Blatchf. 308, Fed. Cas. No. 371.

The assignments of error present no other question than that of the validity of the patent. They are not well founded, and the decree is accordingly affirmed, with costs.

(88 Fed. 286.)

WILSON et al. v. CONSOLIDATED STORE-SERVICE CO.

(Circuit Court of Appeals, First Circuit. June 14, 1898.)

No. 237.

1. PATENTS—PRELIMINARY INJUNCTIONS.
   Sometimes a preliminary injunction may issue in a suit on a patent when the validity of the patent is clear, though it has not been sustained by a prior adjudication or public acquiescence.
2. SAME—PRIOR ADJUDICATIONS—INTERFERENCE PROCEEDINGS.
   A decision in interference proceedings cannot be invoked, as against strangers to it, as a ground for the issuance of a preliminary injunction.
3. SAME—PRIOR JUDGMENTS AND ACQUIESCENCE.
   With reference to a prior judgment or general acquiescence, there must be the same freedom from doubt, in behalf of a party applying for a temporary injunction, as if the question were one of validity alone. And a judgment rendered in a cause which, by reason of an adjustment among the parties, became practically a mere case before it was judicially passed upon, is not sufficient ground for granting such an injunction.
4. SAME—CASH CARRIERS.
   An order granting a preliminary injunction against infringement of the Osgood patents, Nos. 357,851 and 293,192, for a cash carrier, or store-service apparatus, reversed on appeal because the validity of the patent is doubtful, and because there was no clear adjudication sustaining the patent after bona fide contest, and no sufficient proof of public acquiescence.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity by the Consolidated Store-Service Company against John W. Wilson and others for alleged infringement of letters patent No. 357,851, issued February 15, 1887, to Edwin P. Osgood, and No. 293,192, issued February 5, 1884, to Byron A. Osgood and Edwin P. Osgood, which patents are for cash carriers, or store-service apparatus. In the circuit court a preliminary injunction was granted (83 Fed. 201), and the defendants have appealed.

Charles E. Mitchell and Elihu G. Loomis, for appellants.

Frederick P. Fish and Guy Cunningham, for appellee.

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Before PUTNAM, Circuit Judge, and BROWN and LOWELL, District Judges.

PUTNAM, Circuit Judge. This is an appeal from an order granting an ad interim injunction in a patent suit. Apparently, the hearing on the application for the injunction occurred only a short time before the complainant below might have brought the case to an issue on bill, answer, and proofs. Meanwhile a voluminous record was made up on the application, which apparently had in view a determination as on the full merits of the cause. These matters were not brought to the attention of the court below, and we would not be justified in commenting on this particular record in these respects. We refer to them only because we do not wish to leave any presumption that we impliedly approve that parties should proceed with a voluminous hearing on a mere motion for an ad interim injunction at a time when a final hearing may be accomplished almost as speedily. Under the circumstances, there are some grounds for presuming that both parties intended to waive all objections as to the issues to be determined on the motion. At the hearing before us, however, the appellants took the usual special objections against the issue of temporary injunctions. Consequently we are not justified in assuming that the parties intended any waiver.

Coming to the rules applicable under these circumstances, it cannot be denied that a preliminary injunction may properly issue in a patent suit, where the validity of the patent is clear, although it has not been sustained by a prior adjudication or public acquiescence. Of course, there must in every instance be an equitable necessity for relief by injunction; but we are not required to consider this necessity, because the case at bar clearly falls within the rule stated by this court in Davis Electric Works v. Edison Electric Light Co., 8 C. C. A. 615, 621, 60 Fed. 276, 282, that:

> "The fundamental basis of jurisdiction in equity in relation to patent rights and trade-marks is the necessity of protecting established enterprises from the great uncertainty caused by infringements, and by the difficulty of measuring the direct and indirect losses if infringements continue."

When the effect of a temporary injunction is merely to maintain matters statu quo until a final hearing, one may well be granted, notwithstanding the rights of the complainant are doubtful, and sometimes even when very doubtful. But in patent suits such an injunction does not ordinarily have that effect. On the other hand, the respondent, while under the injunction, is ordinarily a constant loser, and never regains his losses unless the complainant has given a bond. Therefore in this class of cases the courts usually hold that unless the patent is supported by public acquiescence or prior adjudication, or some other peculiar condition, the complainant's rights must be free from doubt, to entitle him to a preliminary injunction. It is sufficient for this to refer to Rob. Pat. § 1173 et seq., and North v. Kershaw (1857) 4 Blatchf. 70, Fed. Cas. No. 10,311, and to the expressions of the circuit court of appeals for the Seventh circuit, in Standard Elevator Co. v. Crane Elevator Co., 6 C. C. A. 100,

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56 Fed. 718, 719, reaffirmed by the same court in Williams v. Manufacturing Co., 23 C. C. A. 171, 77 Fed. 285, 286.

The case at bar is not an exceptional one in other particulars, so that the questions are as follows: Is the validity of the patent clear? or has there been a prior adjudication? or has there been sufficient acquiescence?

The validity of the claim in issue in each of the two patents in suit is far from clear. It is sufficient to say that we are all of the opinion that the validity of each claim is very doubtful, although we do not deem it necessary at this stage of the proceedings to elaborate the matter. Indeed, we regard it prudent not to do so, in view of the fact that the case may again come before us on final hearing.

The complainant below relies on the result of certain interference proceedings in the patent office as constituting a prior adjudication; but the defendants below were not parties to that proceeding, and the authorities cited by the complainant are limited to privies. The issues on an interference proceeding are narrow, when compared with the broad question of the validity of a patent, and the method of procedure in the patent office is so unlike that of judicial tribunals that a use made of the latter furnishes no precedent for a use to be made of the former. Walk. Pat. (3d Ed.) § 674, states that an interference proceeding cannot be invoked against strangers on the question of a preliminary injunction; and Judge Lacombe, who carefully reviewed the decisions in regard to this matter, in Dickerson v. Machine Co., 35 Fed. 143, 147, came to the just conclusion that the only adjudication which can support such an injunction, is a judicial one. This leaves to be considered, on this point, the prior suit of Store-Service Co. v. Whipple, 75 Fed. 27, in which an interlocutory decree was rendered sustaining the claims now in suit. The rule as to prior litigation was stated by the circuit court of appeals, in the Seventh circuit, in Electric Mfg. Co. v. Edison Electric Light Co., 10 C. C. A. 106, 61 Fed. 834, 836, and, as there stated, was approved by this court in Bresnahan v. Leveler Co., 19 C. C. A. 237, 72 Fed. 920, 921. It requires "a bona fide and strenuous contest," resulting in favor of the validity of the patent. With reference to a prior judgment or general acquiescence, it is clear, on principle, that there must be the same freedom from doubt, in behalf of a party applying for a temporary injunction, as if the question was one of validity alone. A court would be no more justified in granting such an injunction on a doubtful case of a prior judgment than it would on a doubtful case of validity. Neither can a doubtful case of a prior judgment be assisted by a doubtful case of acquiescence, and vice versa. It is plain, on principle, that the complainant's right must be clear, either as to the validity of the patent, or on the question of a prior judgment, or on the question of acquiescence, although, of course, judgments rendered by consent may be admissible on the proposition of acquiescence, even when not so on that which we are now considering. The position with reference to the decree against Whipple is as follows: Whipple was the agent of a corporation known as the Fuller Company, and

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was sued by the complainant below because, as agent of the Fuller Company, he had leased or constructed cash-carrier systems, to or for various users, alleged to infringe the patents in suit. The suit against him was begun on June 20, 1894, and the defense was assumed by the Fuller Company. At that time the complainant below had made an adjustment with a corporation, known as the Lamson Company, of certain controversies in regard to the patents in issue here. This adjustment was of such a character that, although its terms are somewhat confusing, yet its effect gave that corporation all the same practical advantages with reference to all parties with whom it had dealt, or might afterwards deal, as though it had become a co-owner of the patents. Afterwards, on August 15, 1895, the Lamson Company, having then this broad contract with the complainant below, purchased from the Fuller Company its business, and stipulated with it that the Lamson Company would obtain from the complainant below licenses under the patents in suit, and waivers of all claims for damages, covering all the customers of the Fuller Company, not exceeding 2,000 stations, and that, so far as it did not accomplish this, it would assume the defense of the suits of the complainant below against the Fuller Company, its agents and customers. Thereupon the counsel who had been employed by the Fuller Company in the Whipple suit was superseded in that suit by the counsel of the Lamson Company. Whipple was not a customer, but an agent; and it is possible that a full investigation of all the facts, and a careful construction of the two contracts referred to (that is, the contract between the complainant below and the Lamson Company and that between the Lamson Company and the Fuller Company), might leave some remnant for a proceeding against him by the injunction which the interlocutory decree directed to issue against him. But the Lamson Company had no interest in preventing the issue of an injunction against Whipple, as, under its contract with the complainant below, it could at once license Whipple as its own customer, and thus practically annul the injunction. It is true, the interlocutory decree which was entered in the suit against Whipple may be assumed to have provided for an assessment of damages and profits; but there is no evidence that this was ever done, or that, under the contracts between the parties which we have referred to, it could have resulted in anything substantial. On the other hand, as, under its adjustment with the complainant below, the Lamson Company was practically enjoying the advantages of a co-ownership of the patents in suit, it was apparently for its interest to have the patents sustained, even if, as a consequence thereof, it might be compelled to pay some damages pursuant to its contract with the Fuller Company. On the whole, the best conclusion which can be formed, on the record as presented to us, is that the suit against Whipple, before it was finally passed on judicially, became a moot case. Apparently, the question of patentability, which, rather than that of mere anticipation, is the important one, was not presented in that suit; and it is plain that under the rule which we have cited, as to the requisites of a prior adjudication as the basis of a temporary injunction, the decree therein is not suffi-

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cient on the questions now on appeal. The complainant maintains that it prosecuted the case against Whipple vigorously, and that it ought not to be made to suffer for any matter which was omitted by the Lamson Company in defending it. This is not at all relevant, because the question is not whether it can be made to suffer in consequence of that suit, but what it shall gain by virtue of it.

General acquiescence in the patents in suit is set up in the bill, but it has not been pressed on us. The law as to this is succinctly stated in Sargent v. Seagrave, 2 Curt. 553, 558, Fed. Cas. No. 12,365. While acquiescence, even of a qualified or doubtful nature, may give aid to a patent on a final hearing, yet, as already said, when relied on to support a temporary injunction it must be clear in its character and extent. There is nothing in this record answering this requirement. The bill gives the result of the litigation with the Lamson Company, as shown by the adjustment to which we have already referred; and, if that corporation had been the only infringer, the claim of acquiescence would be established. But the bill states that there were many other infringers, against some of whom suits are still pending. Also, the record leads to the inference that the patents have been in constant litigation, although it is alleged that, so far as the litigation has been determined, it has resulted in favor of the patents. This undoubtedly refers to various adjustments of suits, because no decision of any court is produced, except that in the Whipple Case.

The result is that whether we look at the question of validity, or at that of a prior adjudication, or at that of alleged public acquiescence, the position is too doubtful to justify a temporary injunction in a patent suit. The order appealed from is reversed, and the costs of appeal are awarded to the appellants.

(88 Fed. 350.)

TAYLOR et al. v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Sixth Circuit. July 5, 1898.)

No. 599.

1. FEDERAL COURTS—JURISDICTION—SUIT AGAINST STATE OFFICERS.
   A suit against state officers to enjoin them from certifying a tax, which they claimed to do by authority of the state, but which complainant avers to be without lawful authority, is not a suit against the state, within the meaning of the eleventh amendment.
2. SAME—INJUNCTION AGAINST TAXATION—STATE STATUTES.
   That a state statute forbids the courts to enjoin collection of alleged illegal taxes, and restricts the remedy to an action to recover them back, does not affect the jurisdiction of a federal court, in cases of diverse citizenship, to entertain a suit to enjoin the state officers from certifying or collecting illegal taxes.
3. ENJOINING COLLECTION OF TAXES—EQUITY JURISDICTION.
   A suit to enjoin the collection of a tax will not be entertained (at least, in the federal courts) when the sole ground relied on is that the tax is illegal or excessive. It must appear in addition that the circumstances make the wrong about to be inflicted of such a peculiar character that

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the remedies at law are inadequate, and so bring the case under some recognized head of equity jurisdiction.

4. SAME—REMEDY BY CERTIORARI.

It would seem that the fact that there is a remedy by certiorari in the state courts, which would prevent a multiplicity of suits in a case of illegal taxation, does not affect the jurisdiction of a federal court in equ ty to enjoin the enforcement of the tax in cases of diverse citizenship, as the remedy by certiorari is not available in the federal courts, whose powers to issue the writ are limited to cases in which it is necessary for the exercise of their jurisdiction.

5. SAME.

In any event, certiorari is not an adequate remedy where the fact upon which the claim for relief is based can only be made to appear de hors the record.

6. TAXATION—RAILROADS, TELEGRAPHS, AND TELEPHONES—TENNESSEE STATUTES.

Act Tenn. April 5, 1897, in relation to the taxation of railroad, telephone, and telegraph property, which required the board of assessors therein provided for to complete their assessment on or before September 1st of that year, annulled by implication, and superseded, the assessment previously made for the same year by the old board of assessors under the act of 1895.

7. SAME—RELEVANCY OF EVIDENCE—MARKET VALUE OF STOCK AND BONDS.

In valuing railroad property for purposes of taxation, the market value of the bonds and stock of the corporation owning it may properly be considered, even if, under the statute, each line of road is to be valued by itself, and not as part of a system.

8. SAME—EQUALIZATION OF ASSESSMENT.

Under the Tennessee railroad assessment act of 1897, neither the board of tax assessors nor the board of equalization are charged with the duty of equalizing the taxable value of real estate with that of railroad property.

9. SAME—CONSTITUTIONAL LAW—EQUALITY OF TAXATION.

Under the Tennessee constitution of 1870 (article 2, § 28), declaring that all property shall be taxed "according to its value," to be ascertained as the legislature shall direct, "so that taxes shall be equal and uniform throughout the state," when it is the uniform practice in the various counties of the state to assess real property at not exceeding 75 per cent. of its true value, an assessment upon railroad property at its full value violates the uniformity of taxation which is the main purpose of the constitutional provision, and will be enjoined, although this involves a violation of the letter of the state statute passed pursuant to the constitution, which requires all property to be assessed at its full value.

10. SAME.

Equity will not enjoin an assessment of property at its full value, on the ground of inequality resulting from the assessment of other property at less than its full value, unless it appears that the assessing officers, whose acts of undervaluation create the unjust burden, intentionally and habitually violate the law by assessing property at less than its true value; but it need not affirmatively appear that they did so with intent to injure complainant and his class of taxpayers.

Appeal from the Circuit Court of the United States for the Middle District of Tennessee.

The Louisville & Nashville Railroad Company—a corporation organized and existing under the laws of the state of Kentucky, and a citizen of that state—owns 519 miles of railroad in Tennessee. It filed its bill in equity in the circuit court of the United States for the Middle district of Tennessee against R. L. Taylor, W. S. Morgan, and E. B. Craig, citizens of Tennessee, who constitute a board of equalization of the state of Tennessee, to enjoin them from certifying, in accordance with the act of the legislature of Tennessee, passed April 5, 1897, a tax valuation upon complainant's railroad in Tennessee, to be apportioned by the state comptroller to the 35 counties,

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cities, and towns in which the road lies. Under the act of 1897, railroad, telephone, and telegraph property is assessed biennially by three members, known as "State Tax Assessors," whose assessment must be revised upon the record by another board, called the "Board of Equalization," composed of the governor, secretary of state, and treasurer. The appellate board is given the power to examine each assessment, and increase or diminish the valuation upon any one or more of the properties assessed, so as to fix the proper value; and, until this board has acted upon the assessments, they are not deemed complete. The valuations fixed by the appellate board are certified to the comptroller, and he, in turn, certifies to the various counties and municipalities the valuation upon which taxes are to be collected by the respective counties and municipalities, the apportionment being graduated according to the mileage or value of the property assessed in each county and municipality. Under other laws of Tennessee, real and personal property of all persons, except railroad, telephone, and telegraph companies, is assessed by the taxing officers of each county. In counties having a population of 60,000 and over, one assessor for the county is elected, whose duty it is to assess all property in the county. In counties having a less population, each civil district has one assessor. Each assessor, before entering upon his duties, is required to enter into a bond in the sum of $5,000, conditioned that he shall faithfully and honestly discharge the duties of his office, and to take and subscribe an oath that he will assess property at its fair cash valuation, without fear or favor. A board of equalization is provided for each county, composed of the judge or chairman of the county court, and four freeholders, not members of the county court, and not holding any other office,—state, county, or federal. These various boards meet in their respective counties, and compare and equalize the assessments of property made in and for the particular county. If the board desires to raise the value of any taxpayer's property, it can be done, upon notice to the taxpayer. Assessments of real estate made in 1896 were made for the biennial period of 1896 and 1897. Beginning with 1898, the assessments of realty are to be made every fourth year. Personal property is assessed annually. Until 1895 no attempt had ever been made to equalize the assessments of real estate or personalty, as between the different counties; but at its session in that year the general assembly created a state board of equalizers, for the purpose of equalizing the values of real estate in the various counties. The same board was given power to assess and apportion the value of railroads throughout the state. In 1896 the board of equalizers assessed the complainant's railroad for the taxes of 1896 and 1897 as follows: The main line, at the rate of $31,000 a mile; the Nashville & Decatur division, at the rate of $21,000 a mile; the Henderson division, at the rate of $20,000 a mile; the Memphis division, at $13,500 a mile; the Cumberland Valley division, at the rate of $15,000 a mile; the Clarksville & Princeton division, at the rate of $4,000 a mile. By the act of April, 1897, the board of equalizers was abolished, and the duty of assessing railroads was imposed on a state board of tax assessors and a revisory board called the "Board of Equalization," but no power was given to the new board to equalize real estate. The board of state tax assessors made an assessment of railroads for 1897 and 1898, treating the assessment by the board of equalizers as annulled by the new law. Their valuation of complainant's main line was $65,000 per mile; of the Nashville & Decatur division was $47,000 per mile; of the Henderson division, $62,000 per mile; of the Memphis division, $27,000 per mile; of the Cumberland Valley division, $23,500 per mile; of the Clarksville & Princeton division, $5,000 per mile; and of the Clarksville & Mineral division, $7,000 per mile. The appellate board of equalization on appeal reduced the assessment on the main line from $65,000 to $60,000; on the Henderson division, from $62,000 to $55,000; on the Nashville & Decatur division, from $47,000 to $40,000 per mile,—but in other respects affirmed the action of board of assessors.

Among other grounds set forth in the bill for equitable relief against this increase in the assessment is the following averment with reference to the evidence brought out before the state tax assessors: "That the complainant also filed in its behalf before said assessors a large number of affidavits (about 155 in number) made by tax assessors, trustees, other officials, and

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real-estate owners, which showed that in the counties through which plaintiff's said roads ran, and in the counties through which other railroad properties assessed at the same time by said assessors ran, real estate, generally and systematically, was assessed for taxation at from fifty to seventy per cent. of its value. These affidavits varied in form, but the general tenor and result of them, and of depositions taken and filed as evidence by plaintiff, was to establish the fact that property generally in Tennessee, other than railroad property, by assessments generally and purposely made, does not bear a burden of taxation at a greater proportion than an average of sixty per cent. of its market value; and plaintiff alleges that such is the case, and that its said properties for said years, as finally fixed by said board of equalization, were assessed at more than their full value. Recognizing the fact that throughout the state of Tennessee property had been systematically assessed, from time immemorial, at a valuation for the purpose of taxation greatly less than its actual value, and at a valuation ranging from fifty to about sixty-five per cent. thereof, the state of Tennessee, through its board of assessors and equalizers, during the years 1895 and 1896 endeavored to systematize the county assessments, and bring them up to a common standard or basis of valuation. Accordingly the said board established as the basis of assessment for taxation in all of the counties of the state seventy-five per cent. of the actual or true value of the lands or property to be assessed, and raised the assessment in the various counties of the state for both said years, where they were less than seventy-five per cent., to seventy-five per cent. Plaintiff further shows that the said board of assessors and equalizers was the first state board of equalizers in the state of Tennessee, and was a legislative recognition of the systematic usage and custom of valuation prevailing, and the legislative purpose to render it uniform throughout the state. Plaintiff further states that said board of assessors and equalizers was not only intrusted with the power of equalizing assessments throughout the state, but also with the duty of assessing railroad, telegraph, and telephone properties for taxation; and it avers and charges that the assessment made by said board, and the valuation fixed upon said properties, were made by them at the rates fixed for the purpose of equalizing the assessments of such properties with those of the lands of Tennessee. If said assessments [i. e. those against which an injunction is prayed] stand, plaintiff will be bearing, in comparison with other property assessed in the state of Tennessee, at least twenty-five per cent. more than its just proportion; and the burden of taxation thus imposed upon it will be unequal, and in contravention of the constitution of the state of Tennessee, which provides that all property shall be taxed according to its value, and so that taxes shall be equal and uniform throughout the state, and so that no one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value, and also in contravention of the constitution of the United States, which guaranties to plaintiff and its property the equal protection of the laws." The bill further avers: "In pursuance of said assessment act, said board of equalizers will, as they have informed plaintiff's counsel, unless prevented, certify at 12 m., November 30, 1897, to the comptroller, the valuations so fixed by them upon said property. The comptroller will proceed, after said assessment shall have been certified to him according to the course of law, to collect for the state the taxes so wrongfully assessed, and will certify to the several towns, cities, and counties through which said roads pass, the said assessments; and the said towns, cities, and counties will proceed, under said act, to collect the same. Under said act, said taxes so assessed in behalf of the state, counties, and cities will become a first lien upon the property from the 10th of January of the year for which they are assessed. If the said taxes are not paid as assessed, distress warrants will issue against petitioner; and, if it shall not pay the same, then the comptroller will, under said act, advertise said property, and sell the same for cash, free from the equity of redemption, and execute to the purchaser a deed or deeds. Said roads are assessed for, and taxes will be payable under said assessments to, the following counties and towns in the state of Tennessee: Counties: Sumner, Davidson, Montgomery, Houston, Benton, Fayette, Henry, Carroll, Gibson, Stewart, Crockett, Haywood, Tipton, Shelby, Robertson, Dickson, Clai-

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borne, Campbell, Williamson, Maury, and Giles. Cities and towns: Gallatin, Nashville, Springfield, Franklin, Columbia, Pulaski, Brownsville, Memphis, Erin, McKenzie, Humboldt, Milan, Paris, Clarksville, and a number of others. If plaintiff should seek by separate suits to resist said state tax, and the several taxes for said counties and cities, it would cause a multiplicity of suits, entailing great hardship and expense; and if it should pay said taxes, and sue to recover them, the same result would follow. Plaintiff charges and says that the action of said board of assessors and of said board of equalizers was arbitrary, oppressive, in violation of the law, and will, if carried into effect, impose upon plaintiff a burden unjust and unequal, as between itself and other property owners throughout the state of Tennessee." The prayer of the bill was for an injunction against the defendants to prevent their certifying and delivering in any way to the comptroller of Tennessee the said assessment of the plaintiff's property so made by them, and from certifying or delivering in any way to the said comptroller the result of their action in respect of the assessment of the said properties of plaintiff for the years 1897 and 1898, or either of them, and that upon final hearing said injunction be made final, and for such further and other relief as the nature of this case may require.

The defendants filed a joint and separate answer, in which the reply to the passage already quoted from the bill was as follows: "Further answering, defendants say that complainant filed in its behalf before said assessors a large number of affidavits made by county tax assessors, trustees, other officials, real-estate owners, and others, in thirty-five counties in Tennessee, tending to show the assessed value of real estate in said counties. Said affidavits show that there was no uniformity in assessed values of real estate in the counties mentioned, but they did not show that there was any preconcert or agreement among the assessors touching the standard of value fixed upon real estate for the purpose of assessment. The valuations were not uniform. In some instances they were higher than others, and there was great irregularity and lack of uniformity in valuations. Defendants deny that the general tenor and result of said depositions and affidavits taken and filed by complainant was to establish the fact that property generally in Tennessee, other than railroad property, by assessments generally and purposely made, does not bear a burden of taxation at a greater proportion than the average of sixty per cent. of its market value. Defendants deny the statement that such is the case, and they deny that there was, or ever has been, any custom, immemorial or otherwise, of valuing property throughout the state at less than its true value. There are ninety-six counties in the state, and there never has been, and in the nature of things could not be, any concerted, agreed, or uniform basis of valuation, different from that prescribed by law. There are seventy-nine counties in the state through which railroads run, and said affidavits are from only thirty-five counties. Defendants say the various railroad companies objecting to the assessments made by the state tax assessors actively and energetically made strenuous efforts to obtain affidavits from any possible source showing assessments have been made below cash value, but none have been produced from forty-four counties of the seventy-nine having railroads in same. It was the function and within the jurisdiction of the assessors, in the first instance, and these defendants, acting as the board of equalization, to judge of the sufficiency and probative force or value of said affidavits as evidence; and their judgment was final and conclusive, and cannot be questioned or reviewed. Defendants also deny the statement that complainant's said properties for said years, as finally fixed by said board of equalization, were assessed at more than full value. They submit that the valuation of said board, under the laws of Tennessee, as will be more fully hereinafter shown, is final and conclusive. Defendants deny that the creation of the board of equalizers of 1895 and 1896 was a legislative recognition of the systematic usage and custom of valuation prevailing, and the legislative purpose to render it uniform throughout the state; but, on the contrary, said board was created for the purpose of putting property inadequately assessed, through the favoritism or mistaken judgment of local tax authorities, upon an equality with the property fairly assessed at its cash value, as required by law, and seeing that all property within the jurisdiction of the equalizers

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should be assessed at a fair cash value. Defendants deny that the board of equalizers of 1895 and 1896, by any official action, record, or report, put property in Tennessee upon a basis of seventy-five per cent. of the actual cash value of the same. If such was the basis of purported equalization on the part of the members of said board, it was one by some sort of an understanding among said members, never put of record in any official action, and kept from record in its minutes or inclusion on its report, and, if done, was in violation of law, and unauthorized by the statute creating the board, and subversive to the main purposes for which it was created. Defendants deny that the assessments and valuations of railroad, telegraph, and telephone properties made by said board for 1895 and 1896 were made at the same rate fixed for the purpose of equalizing the assessment of such properties with those of the lands of Tennessee. Upon information given by one of the members of said board in his deposition before the state tax assessors, and which remains uncontradicted, defendants state that most of the railroad properties in the state of Tennessee were assessed and valued at less than seventy-five per cent. of their actual cash value. Defendants deny that, by the assessment made, complainant will be bearing, or is made to bear, in comparison with other property assessed in the state of Tennessee, at least twenty-five per cent. more than its just proportion. Defendants deny that said assessments violate any provision of the constitution of the state of Tennessee, or the constitution of the United States." The answer further avers that the complainant has an adequate, sufficient, and complete remedy at law furnished it by the act passed in 1873, which provides that in all cases in which an officer charged by law with the collection of revenue due the state shall institute any proceedings or take any steps for the collection of the same, and the person proceeded against shall claim the tax to be unjust or illegal, or against any clause of the statute or of the constitution of the state, he shall pay the same to the state under protest, and file a suit within thirty days thereafter for the recovery of the same against the officer, and, if he obtains judgment, then the comptroller of the state shall issue his warrant for the amount thereof. The act provides that no writ for the prevention of the collection of any revenue claimed shall in any wise issue, either in the form of an injunction or otherwise. The answer further avers that there is a remedy by certiorari for the correction of errors alleged to have been committed by the state tax assessors, and that said remedy is exclusive of all others.

A temporary restraining order ex parte was issued on the filing of the bill, and then the cause came on for hearing on motion for preliminary injunction, at which a large amount of evidence was introduced, and the case was fully argued. The district judge (Clark) presiding filed an elaborate opinion, discussing the issues presented on the bill. It is reported in 86 Fed. 168. The circuit court made the following order: "Ordered and adjudged that the writ of injunction issue in this case, restraining and enjoining the defendants, Robert L. Taylor (governor), E. B. Craig (treasurer), and W. S. Morgan (secretary of state), ex officio the board of equalization for the state of Tennessee, from certifying and delivering to the comptroller of the treasury of Tennessee the valuation fixed by them upon the property of the complainant in Tennessee for taxation for the years 1897 and 1898, as set forth and shown in the bill, and restraining and enjoining them from certifying and delivering the said assessment or any record thereof, to the said comptroller: provided, however, that the complainant shall pay to the proper officers such sum or sums of money as shall be equal to the amount or amounts of the taxes assessed against and due from said company on its said property under and according to the assessment made in 1896 for the year 1897, and shall pay the same as, and it shall be a credit on, the taxes due from the complainant on its said property for the year 1897, to go as a credit on the assessment made in 1897 for 1897, if sustained on the final hearing; otherwise to be credited as may hereafter be decreed. And it shall be paid and received without prejudice to any right of either of the parties, or the state, counties, and municipalities of this state. Such payment must be made on or before the date at which the tax for 1897 must be paid, viz. February 1, 1898; and, if not then paid, the defendants may, upon notice of such failure, apply for and obtain a dissolution of the said injunction."

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Geo. W. Pickle, Atty. Gen. (James C. Bradford and Granbery Marks, of counsel), for appellants.

Dickinson & Waller and Vertrees & Vertrees, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts, as above). The complainant below is a citizen of the state of Kentucky. The defendants are citizens of the state of Tennessee. The amount involved in the suit exceeds $2,000. The constitution and the laws of the United States confer upon circuit courts of the United States jurisdiction to hear and determine controversies in law and equity between citizens of different states in which is involved more than $2,000. There is no doubt, therefore, of the jurisdiction of the court below to hear and decide this case, unless the fact that the defendants were officers of the state of Tennessee, and were claiming to proceed under the authority of the state in the acts threatened and now enjoined, makes this a suit against the state of Tennessee. If so, then it is within the eleventh amendment of the federal constitution, which declares that the judicial power of the United States shall not extend to suits against a state. The complaint of the taxpayer in this case is that the defendants are about to execute a taxing law of the state against complainant in such a manner that, in view of the mode in which other taxing laws are executed against a large part of the taxable property of the state, the defendants will impose upon complainant an illegal burden, in violation of its right under the state constitution to pay only an equal share of the taxes in proportion to the value of its property. This is not a suit against the state. It is a suit against individuals, seeking to enjoin them from doing certain acts which they assert to be by the authority of the state, but which the complainant avers to be without lawful authority. The point has been so often decided by the supreme court of the United States that it is sufficient to refer to a few of the cases. Smyth v. Ames, 169 U. S. 518, 18 Sup. Ct. 423; Reagan v. Trust Co., 154 U. S. 362, 390, 391, 14 Sup. Ct. 1047; Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699; Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962. In Cummings v. Bank, 101 U. S. 153, a decree of injunction entered by a circuit court of the United States against state officers to prevent the enforcement of a state tax law in a manner violating the constitution of the state was affirmed by the supreme court of the United States, and it was then so well settled that such a suit was not within the eleventh amendment that the court did not deem it necessary to discuss the point.

The power to tax property is the power to take from the owner that which is his, to defray the expense of the benefit and protection which he receives from the government. If the power is illegally exercised, either by the legislature or the executive, it is an invasion of private right; and, unless there is some specific limitation upon the remedy imposed by law, the injured taxpayer may resort to the courts to vindicate his right against those officers who attempt such an in-

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vasion, by any form of action which he could use against any other wrongdoers in respect of the same class of wrongs. The state may limit the remedies of the taxpayer to redress wrongs done him by the erroneous statutory construction or the unwarranted finding of fact by administrative officers to a hearing before administrative tribunals. In tax questions, such a hearing is due process of law. Murray v. Improvement Co., 18 How. 272; Ferry v. U. S., 85 Fed. 550.[1] The state may further curtail the jurisdiction of its courts of equity to interfere by injunction with the collection of taxes alleged to be illegal by providing that no injunction shall issue in such case. The government of the United States has made such a specific limitation, and no injunction can issue to prevent the collection of taxes levied by it. Rev. St. U. S. § 3224. The only remedy of the taxpayer is to pay the money, and sue to recover it back. The state of Tennessee has made a similar provision with respect to taxes collected for its use, but not as to taxes collected for its counties and cities. City of Nashville v. Smith, 86 Tenn. 217, 6 S. W. 273. The law of the United States forbidding injunctions in federal revenue cases prevents the issuing of an injunction by any court, whether federal or state, because the constitution and laws of the United States passed in pursuance thereof are the supreme law of the land. The law of Tennessee, however, affects only the jurisdiction of its own courts of equity. It does not restrict or diminish the power or jurisdiction of federal courts of equity, because only an act of congress can do that. In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785; Mississippi Mills v. Cohn, 150 U. S. 202, 14 Sup. Ct. 75; Kirby v. Railway Co., 120 U. S. 130, 7 Sup. Ct. 430; Furnace Co. v. Witherow, 149 U. S. 574, 13 Sup. Ct. 936. Hence it follows that if the controversy at bar is one over which the circuit court of the United States, sitting in equity, from which this appeal has been taken, has jurisdiction by virtue of the constitution and laws of the United States, and according to the general principles governing equity jurisdiction, its power to issue an injunction against state officers is not restricted by a state statute which only applies, and can only apply, to injunctions issued out of state courts.

We have seen that the circuit court has jurisdiction over the cause, because it is a suit between citizens of different states. It only remains to inquire whether any ground exists for invoking the action of a court of equity. It is well settled that a suit to enjoin the collection of a tax will not be entertained in courts of equity,—at least, in those of the United States,—in which the sole ground set forth in the bill is that the tax is illegal or excessive. It must appear in addition that the circumstances makes the wrong about to be inflicted of such a peculiar character that the remedies in a court of law are inadequate, and so bring the case under some recognized head of equity jurisdiction. Ogden City v. Armstrong, 168 U. S. 224, 236, 18 Sup. Ct. 98; Express Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. 250; Allen v. Car Co., 139 U. S. 658, 661, 11 Sup. Ct. 682; Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646; Railway Co. v. Cheyenne, 113 U. S. 516, 525, 5 Sup. Ct. 601; Hannewinkle v. Georgetown, 15 Wall. 547; Dows

[1] 29 C. C. A. 345.

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v. City of Chicago, 11 Wall. 108. It appears from the bill that, if the assessment made by the defendants in this case is allowed to be certified down to the various counties and cities who are to collect the tax, the complainant, in order to vindicate its rights in a suit at law, will have to bring at least 35 different suits at law. Courts of equity frequently interfere to prevent a multiplicity of suits at law. It is a well-recognized head of equity jurisdiction. In Sanford v. Poe, 37 U. S. App. 378, 16 C. C. A. 305, and 69 Fed. 546, this court sustained the equity jurisdiction of the circuit court to enjoin a state board for the assessment of telegraph and express companies from certifying the assessment to a large number of counties, on the ground that by the exercise of such jurisdiction a multiplicity of suits at law would be prevented, and the questions at issue could all be settled in one suit. In many cases in which the question of the equitable jurisdiction to enjoin a tax is considered by the supreme court of the United States, the prevention of a multiplicity of suits is specifically mentioned as a sufficient reason for its exercise. Dows v. City of Chicago, 11 Wall. 108; Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646; Express Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. 250.

Another ground for equitable relief is that the excessive tax, if not paid, will be a cloud upon the title of the complainant, for the taxes assessed are a lien upon its property in Tennesseee. The tax is not void, and the alleged illegal excess does not appear upon the record. It creates such an apparently valid incumbrance that a court of equity will interfere to remove it as a cloud, if in fact it is illegal. Ogden City v. Armstrong, 168 U. S. 224, 238, 18 Sup. Ct. 98.

It is argued on behalf of the defendants that there is an adequate remedy at law, which will prevent a multiplicity of suits, and that is by certiorari in the state courts. Such a proceeding is in its nature supervisory and appellate. Circuit courts of the United States are limited in their use of the writ of certiorari to those cases in which it is necessary for the exercise of their jurisdiction. Rev. St. U. S. § 716. Ex parte Vallandigham, 1 Wall. 243. In other words, the writ can only be used as ancillary to some other jurisdiction conferred by law; and, as no supervisory or appellate jurisdiction has been conferred upon circuit courts of the United States to revise the proceedings of special tax tribunals, it would seem clear that the circuit court below could not, on its law side, have furnished a remedy by certiorari to modify the assessments made by the defendants. The ordinary rule is that statutory remedies at law furnished by a state in its own courts will not oust the equitable jurisdiction of the federal courts of equity. This has been laid down with emphatic clearness by Mr. Justice Harlan, speaking for the supreme court, in Smyth v. Ames, 169 U. S. 466, 516, 18 Sup. Ct. 418. In that case it was argued that equitable jurisdiction to enjoin the action of a state railroad commission from putting into force an order fixing confiscatory railroad freight rates was prevented by the circumstance that the state had furnished a special remedy at law in the state supreme court for the revision of any unreasonable

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action by the commission. The argument was not successful. Mr. Justice Harlan said:

"One who is entitled to sue in the federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court, and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."

In Payne v. Hook, 7 Wall. 425, 430, it was objected to the federal jurisdiction in equity that there was an adequate remedy at law, by a special proceeding in the probate court, but it was held that this was insufficient. We should have no doubt upon this point, were it not for the decision of the supreme court in Ewing v. City of St. Louis, 5 Wall. 418, in which it appears to have been held that a remedy by certiorari in a state court for the review of special state tribunals was ground for holding that the circuit court of the United States had no equitable jurisdiction to enjoin the action of the state tribunal—

"Unless it should become necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence. * * * The complainant can ask no greater relief in the courts of the United States than he could obtain were he to resort to the state courts. If in the latter courts equity would afford no relief, neither will it in the former."

It is difficult to reconcile the case, on its facts with Payne v. Hook and Smyth v. Ames, and the statement in the last sentence quoted is certainly not in accordance with the views expressed by the supreme court in many later cases. See In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785; McConihay v. Wright, 121 U. S. 201, 7 Sup. Ct. 940. The language of Ewing v. City of St. Louis has, however, never been cited or commented on, or expressly overruled, by the supreme court. We prefer, therefore, to base the equitable jurisdiction in this case on another ground. It seems clear that the question which is mooted before us could not have been adequately raised upon a proceeding by certiorari. The complaint here made is that the board of equalization did not consider the fact that real and personal property, other than that of railroad companies, was habitually and intentionally assessed at 25 per cent. less than its real value, as a reason for reducing the assessment of railroad property to the same percentage. There was nothing on the record made up by the board to show that the defendants did not exercise this power of equalization, and did not exercise their best judgment to fix the assessment of railroads at 25 per cent. less than their real value. If they ought to have done so, and if there was no direct evidence that they did not, the reviewing court, upon certiorari, would have been bound to presume that they did so, and no extrinsic evidence would have been permissible to rebut this presumption. Shelby Co. v. Railroad Co., 16 Lea, 401, 413, 1 S. W. 32; Ogden City v. Armstrong, 168 U. S. 224, 237, 18 Sup. Ct. 98; 2 Spell. Extr. Rem. § 2030.

Coming now to the merits of the bill, and issues raised by it, we pass without discussion the averment that the railroad assessment

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law is unconstitutional, because counsel for appellees have expressly declined to argue the point at this hearing.

Another objection to the validity of defendants' action is that they have made an assessment for the year 1897 without lawful authority. The state board of equalizers and tax assessors created by the act of 1895 had made an assessment of the valuation of railroads for the year 1897, and it is contended that this is the valid assessment. The act of 1897 does not expressly annul the assessment of the old board, but we think that such annulment is necessarily implied. By the first section of the act of 1897, the new board of tax assessors was required to meet in May, 1897. By the second section, the railroad, telegraph, and telephone companies were required to file with the comptroller of the state on or before the 1st of May, 1897, and biennially thereafter, schedules and descriptions of their property. Section 4 directs that the state tax assessors shall receive the schedules from the comptroller immediately upon their organization, and "they shall immediately proceed to ascertain the value of said property for taxation." The assessment is required to be completed by the assessors, and filed with the comptroller, on or before September 1st, and by him, within three days, delivered to the board of equalization, consisting of the governor, the treasurer, and the secretary of state, who are required to examine the assessment and records made by the assessors, and complete the same, by affirming or modifying it, before the 3d day of October. The comptroller is then at once to distribute the assessment to the various counties of the state. Section 15 provides that the taxes so assessed shall be a first lien upon the property from the 10th of January of the year for which the taxes are assessed. Section 18 provides that the assessments shall "be made biennially, beginning with the year 1897." It is impossible to escape the conclusion, from these provisions, that the legislature intended that the new system should go into operation at once, and that the new boards should make an assessment for the current year of 1897. Such an intention cannot be reconciled with a continuance in force of the assessment of the old board for that year. Of course, the assessment of real property by the old board still remained valid, though the board was abolished; but as to railroad, telegraph, and telephone property, the act of 1897 was an annulment pro tanto.

The complainant makes a series of objections to the validity of the assessment of defendants, based on the data upon which the assessments were made, and the refusal of the assessors and the defendants to consider certain evidence tendered by the complainant. We do not propose to discuss the objections seriatim. It is sufficient to say that we find nothing in the evidence that was before the two boards which they might not properly consider, under the laws of Tennessee, as circumstances to aid them in reaching a conclusion as to the value of that part of the railroad of complainant lying in Tennessee. Nor do we discover anything in the record to indicate that such evidence was wrongly applied. We do not find anything in the record or affidavits affirmatively showing that the boards have included in their assessments property of the complainant not in

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Tennessee, and the defendants, in their report of the assessment and in their answer, expressly deny that any such property was included. The exclusion of certain expert evidence to show how unreliable a standard of value are market reports of stocks and bonds we do not regard as material. Even if this were a direct proceeding to review the action of the defendants, as upon error (which it is not), the ruling could hardly be the subject of criticism; for the matters touched upon in the affidavits were matters of general knowledge, which the defendants and the assessors might be presumed to know. The relevancy of such items of evidence as the market values of bonds and stocks, and the amount of gross earnings and the net earnings, in reaching a conclusion as to the value of a railroad or a telegraph line, has been so often recognized by the supreme court of the United States that we need not discuss it. Railroad Co. v. Backus, 154 U. S. 424, 14 Sup. Ct. 1114; Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 17 Sup. Ct. 532; Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 17 Sup. Ct. 305; Id., 166 U. S. 185, 17 Sup. Ct. 604. It is contended that the law of Tennessee, as declared by its supreme court, is that each line of railroad must be valued by itself, and not as part of a system, and therefore that the unit theory, upon which the foregoing decisions were based, has no application to Tennessee. If this be true, it only reduces the size of the unit, but it does not destroy the evidential bearing of stock and bond values upon the value of railroad property; and we must presume, in a collateral attack upon the action of the board, such as this is, in the absence of any showing to the contrary, that, within the limits of the reasonable discretion and judgment vested in the defendants, they gave proper consideration to the Tennessee rule, if it differs from the general rule, in weighing and applying the evidence of stock and bond values to the issue before them.

The next objection to the assessment of the defendants, and the most serious, is that they have assessed the railroad property of the state, including that of complainant, at its real value, whereas all other property of the state is habitually and intentionally assessed by the assessing officers, who are not the defendants, at not exceeding 75 per cent. of its real or correct value. We think it clear, from the provisions of the railroad assessment act of 1897, that neither board thereby created is charged with any duty to equalize the taxable value of real estate with that of railroad property. The board of equalization under the act of 1897 is made up of the same state officers who composed the state board of examiners under the prior act, and they were charged with the duty of revising the assessment of railroads made by the board of assessors and equalizers created by the act of 1895; but they had no revisory duty connected with that board's equalization of real estate throughout the state. Hence when, in 1897, the board of assessors and equalizers was abolished, the equalization of real estate values was abolished. The continuation of the state board of examiners under the new name of the "Board of Equalization" could have no effect to continue in force provisions of law as to state equalization of values of real estate,

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because that board never had any duty connected with the assessment of real estate at all. It is also clear that the act of 1897 commands the two boards created, by its terms, to fix the correct value of the railroad and other property which they assess. This means the real value of the property, and it is conceded that the laws for the assessment of real and personal property impose on the assessing officers the duty of assessing it at the same value.

The contention for the complainant is that the undervaluation of real and personal property is intentional and systematic throughout the state, and is in accordance with an immemorial and well-recognized custom; that, combined with the assessment at full value of all railroad property, the undervaluation of all other property makes a system of taxation operating to impose upon complainant, and all others holding the same class of property, a grossly unjust share of the cost of the state, county, and city governments; that this is in violation of the constitution of the state of Tennessee, which enjoins uniformity of taxation, according to value, on all property, and expressly forbids that one species of property shall be taxed higher than any other; and that a court of equity, because it is unable to remedy the glaring injustice done to complainants and others of the same class, by compelling the assessment on other property to be raised to its real value, may accomplish the same result by enjoining the defendants from assessing railroad property at any higher percentage than that at which other property in the state is assessed, although this is a departure from the rule of action prescribed for them in the statute creating them a taxing board. In considering the soundness of this contention, we come first to the facts. We find from the evidence, which is uncontradicted, that generally, in the state of Tennessee, for a number of years, the assessors and the board of equalization of each county have intended to assess, and have assessed, real and personal property at a uniform percentage less than its real value; that this percentage is not uniform between the counties, but that it is not substantially less than 25 per cent. in any of them. We base our conclusion on 150 affidavits contained in the record. They do not cover specifically more than 35 counties out of the 96 counties in the state; but when they are supplemented by the evidence of the members of the state board of equalizers, who officially investigated the manner of making assessments in each county in the state by actual visits and by correspondence, by examining the assessing officers, and by a comparison of tax values with actual sales, we have no difficulty in finding the fact to be as above stated. The affidavits from different counties are many of them the sworn statements of the assessors and county equalizers themselves, who made the assessments, and leave not the slightest doubt that in each county the undervaluation was systematic, was according to a uniform and well-understood rule of reduction, and was for the purpose of reducing the proportionate burden of the expenses of the state government which the particular county would have to bear. These expenses are, in effect, apportioned to each county in the proportion which its total tax valuation bears to the total tax valuation of all the property in the state. The motive for undervaluation is

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manifest, and the variation in the percentage, as between the counties, is dependent only on the varying extremes to which taxing officers of different counties are willing to go in departing from the statutory rule to reduce the state burden on their respective counties. We further find that in the year 1897, which is one of the years in respect to which relief is asked in the bill, the assessment of real estate which was not affected by the repeal of the act of 1895 was equalized by the state board of assessors and equalizers, under that act, at a basis of 75 per cent. of its real value; that this was done intentionally, and was adopted as a rule of action by that board. This is established by the evidence of two of the three members of the board, and of the secretary of the board; and although there is a discrepancy in their statements, as to whether the basis fixed was 70 or 75 per cent. (two of them saying that it was 70, and the other 75), the fact that they deliberately fixed a percentage of real value as their basis of assessment is admitted by all of them. We are relieved from considering the weight of the evidence as to the exact basis by the averment of the bill, which fixes it at 75 per cent. The assessed value of real and personal property, except railroads and telegraph lines, in Tennessee, for the year 1897, was, in round numbers, $312,000,000. The value of railroads and telegraph lines, as assessed by defendants, was $63,000,000,—an increase of the assessed value of the year before of $25,000,000. This makes a total tax value of $375,000,000, and imposes on the railroads $^{63}/_{375}$, or about $^{1}/_{6}$ of the entire burden of the state, county, and municipal governments. If the assessment of the real and personal property were increased to actual value, it would be $416,000,000, and the share of the railroad in paying governmental expenses would be a little less than $^{1}/_{8}$ of the whole. The existence of this glaring inequality no evidence has been introduced to contradict. The defendants have been content to deny it in a general way in their answer, and have adduced no testimony upon the point from any one professing to have specific knowledge on the subject.

The constitution of Tennessee adopted in 1870 (article 2, § 28) provides that:

"All property—real, personal and mixed—shall be taxed. * * * All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value."

The constitution of 1834, in article 2, § 28, provided that:

"All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that the same shall be equal and uniform throughout the state. No one species of property, from which a tax may be collected, shall be taxed higher than any other species of property of the same value."

The constitution of 1796 provided that:

"All lands liable to taxation in this state, held by deed, grant, or entry, shall be taxed equally and uniform, in such manner that no 100 acres shall be taxed higher than another, except town lots, which shall not be taxed higher

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than 200 acres of land each; no freeman shall be taxed higher than 100 acres, and no slave higher than 200 acres on each poll."

In Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 151, 161, 36 S. W. 1041, 1043, the supreme court of Tennessee, referring to these provisions, said:

"In every instance the requirement that all property (except that mentioned for exemption) shall be taxed prohibits the legislature from making additional exemptions. * * * And likewise the requirement that all property shall be taxed according to its value prohibits the legislature from laying a tax on any property in specie, or by the acre. Under the constitution of 1796, lands were taxed by the hundred acres; but the constitution of 1834, like that of 1870, contained the provision that 'all property shall be taxed according to its value.' This means that every property tax shall be graduated by the value of the property on which it is laid."

There has been much discussion at the bar upon the point whether the constitution of 1870 requires that all property shall be assessed at its full value, or whether it would satisfy the constitution if the taxing laws required all property to be assessed for taxation at a uniform percentage,—say 75 per cent. of its real value. Language has been quoted from the opinions of judges of the supreme court of Tennessee supporting the former view, but they were obiter, and wholly unnecessary to the decision of the cases before the court. Mayor, etc., of Chattanooga v. Nashville, C. & St. L. R. Co., 7 Lea, 569; Brown v. Greer, 3 Head, 696. Speaking for Judge LURTON and myself, we should be inclined to hold that any legislative system of tax assessment of property based on a uniform percentage of its value would be "according to its value," and would be a compliance with the constitutional mandate. This is, we think, in accordance with the latest expression from the supreme court of Tennessee in the Reelfoot Lake Levee District Case, already quoted. Judge SEVERENS doubts, and the difference is not material, for we are unanimously of opinion that the question is not controlling in this case. The constitution expressly gives the legislature the power to prescribe that all property shall be assessed at its true value, and the legislature has done so. Such a legislative command is as binding on those whom it affects as if it were in the constitution, because passed in pursuance of the fundamental law; and counsel for complainant do not avoid the difficulty which confronts them in the case, to wit, that they are seeking to enjoin defendants from doing that which the letter of the law requires the defendants to do, by showing that the requirement is in a constitutionally enacted statute, rather than in the constitution itself.

The sole and manifest purpose of the constitution was to secure uniformity and equality of burden upon all the property in the state. As a means of doing so (conceding that defendant's construction is the correct one), it provided that the assessment should be according to its true value. It emphasized the object of the section by expressly providing that no species of property should be taxed higher than any other species. We have before us a case in which the complaining taxpayer, and other taxpayers owning the same species of property, are taxed at a higher rate than

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the owners of other species of property. This does not come about by legislative discrimination, but by the intentional and systematic disregard of the law by those charged with the duty of assessing all other species of property than that owned by complainant and its fellows of the same class. This is a flagrant violation of the clause of the constitution forbidding discrimination in taxation between different species of property. That clause is self-executing. Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 160, 36 S. W. 1043. How is it to be remedied? It is said on behalf of the defendants that the only method consistent with the constitution is by raising the assessments of the real and personal property. This is no remedy at all. It has been suggested (but we cannot regard the suggestion as a serious one) that the railroad companies of the state should go before the taxing authorities of each county, and, after notifying each taxpayer, attempt to secure an increase in the total tax assessment of the real and personal property of the state from $312,000,000 to $416,000,000. The absolute futility of such a course, the enormous expense, and the length of time necessary in attempting to follow it, need no comment. The question presented is, then, whether, when the sole object of an article of the constitution is being flagrantly defeated, to the gross pecuniary injury of a class of litigants, and one of them appeals to a court of equity for relief, it must be withheld because the only mode of granting it will involve an apparent departure from the method marked out by the constitution and the law for attaining its sole object. We say "apparent" departure from the constitutional method, because that instrument contemplated a system in which all property should be assessed at its real value. It did not intend that a large part should be assessed at 75 per cent., and a smaller part at 100 per cent. The method of assessing one species of property cannot be truly said to be constitutional, without having regard to that pursued with other species; for the essence of the constitutional requirement is uniformity, and uniformity cannot be affirmed to exist without a due regard to the methods of assessing all species. Therefore, to enjoin the enforcement of the prescribed method of assessment as to one species of property, when there is a departure from it as to all others, if the injunction secures uniformity as to all, is not so great a violation of the method really prescribed as that involved in a continuance of the existing conditions, and the denial of relief to the injured taxpayer. The court is placed in a dilemma, from which it can only escape by taking that path which, while it involves a nominal departure from the letter of the law, does injury to no one, and secures that uniformity of tax burden which was the sole end of the constitution. To hold otherwise is to make the restrictions of the constitution instruments for defeating the very purpose they were intended to subserve. It is to stick in the bark, and to be blind to the substance of things. It is to sacrifice justice to its incident. The same dilemma has been presented to other courts. They have not always taken the same horn. There is a conflict of authority, but we are glad to say that the adjudications of that court whose decision we must follow support the views we

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have above expressed. Before examining the cases in the supreme court of the United States, let us refer to the decisions of some of the state courts upon the question:

In Randell v. City of Bridgeport, 63 Conn. 321, 28 Atl. 523, the case came into court on a direct appeal from the action of a board of equalization, called the "Board of Relief of the City of Bridgeport." The superior court found as a fact that it had been the uniform rule of the board of assessors and the board of relief of that city to value all property, for the purpose of taxation, at one-half of its fair market value. The court found that the plaintiff's property was assessed at its full market value as the statute required. The supreme court held that the complainant was entitled to an assessment of one-half the real value of his property, and this in the face of a mandatory provision of the statute that all property should be assessed at its true value. The court said:

"There are two ways in which a taxpayer may be wronged in levying taxes: An assessment may conform to the statute generally, and the individual may be assessed in excess of the statutory requirement. A wrong of that description is easily redressed. But when the town disregards the statute, and establishes a rule of its own, assessing the property at one-half of its actual value, and then assesses an individual at the full value of the property, while the injury is the same, the application of the remedy becomes more complicated. Practically, the only way to redress the wrong is to reduce the assessment, and that makes the court seem to disregard the statute, while, if the wrong is not redressed, there is a denial of justice, and the court practically ignores the statute giving an aggrieved party an appeal, and practically ignores the statute which provides that 'said court shall have power to grant such relief as shall to justice and equity appertain.' Thus we are in a dilemma. If we choose one horn of it, a public statute is violated. not so much by the court as by the town, but by an apparent approval of the court as to one individual, and that by an express command of another statute, and by the dictates of justice. If we take the other horn, the court itself violates a remedial statute, and becomes in a measure a party to the wrongdoing. Under the circumstances, we do not hesitate to choose the former, and to redress the wrong."

This, it is true, was a direct review of the action of the board of equalizers; but the court, in reaching its conclusion, expressly proceeded under the power given it by statute to grant such relief as to justice and equity should appertain. This court is entitled to grant to the complainant exactly the same character of relief. As already pointed out, the fact that the injunction to assess property at its true value is found in the statute, and not in the constitution, cannot create any distinction in respect to the point we are now discussing, for either is equally binding on the taxing officers and the courts. Courts have no more right to set aside a lawfully enacted statute than they have to defeat the operation of the constitution. The point of this case, and those about to be cited, is that where either the uniformity required by law, or the prescribed means of attaining it, must be departed from, the court will choose the lesser evil.

In Cocheco Co. v. Strafford, 51 N. H. 455, the law provided that the selectmen should appraise all taxable property at its full and true value in money. The statute further provided that the court should make such order thereon as justice required. Mr. Justice Doe, upon this point, in a concurring opinion, said:

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"Justice requires an equal rate of taxation of Strafford real estate. If the Strafford real estate of others was appraised in 1870 at a less rate than its full value, the real estate of the plaintiffs should be appraised by the commissioners at the same rate, so that the plaintiffs shall pay their proportion of tax and no more. The usual rate in farming towns is well understood, and the practice of undervaluation is so universal as to raise a presumption of fact that it prevails in Strafford. When the commissioners have ascertained the fact of the full value of the plaintiffs' Strafford real estate on the 1st day of April, 1870, they should proceed further, and appraise it at its value as compared with the value at which other Strafford real estate was appraised by the selectmen in 1870. This comparative value is the only question which the commissioners are appointed to decide, and is a pure question of fact."

This language was approved in Manchester Mills v. Manchester, 58 N. H. 38, on a petition for the abatement of the real-estate tax, in which the court appointed a committee to find and report—First, the true value of the plaintiff's estate; and, second, the true value of real estate of Manchester, other than plaintiff's, compared with its assessed value. The question whether the second point was a proper subject for inquiry came before the court, and it was held that it was a proper subject of inquiry, and that the abatement should proceed on the findings made upon such inquiry.

In Ex parte Ft. Smith & Van Buren Bridge Co., 62 Ark. 461, 36 S. W. 1060, the case arose on an appeal from the refusal of the county board of equalization to reduce the taxation of assessment upon the petitioner's bridge. The assessor had assessed one-half of the bridge in Crawford county at $150,000, and the county board of equalization had reduced this assessment to $125,000. At the trial in the circuit court it appeared that $250,000 was a fair market price for the entire bridge, and that $125,000, therefore, was the full value of one-half of the bridge. It further appeared that all the real estate in Crawford county was assessed at 50 per cent. of its actual value. The appellate court contended that, under the circumstances, the assessment of one-half the bridge should be reduced according to its request to $75,000. The constitution of the state was exactly in the words of the Tennessee constitution, to wit:

"That all property subject to taxation shall be taxed according to its value, to be ascertained in such manner as the general assembly shall direct, making the same equal and uniform throughout the state, and provided further that no one species of property, upon which taxes shall be levied, shall be taxed higher than another species of property of equal value."

The law passed in pursuance of this section of the constitution required the assessors of the counties in the state to assess the real estate at its true market value in money. The court, in construing this question, said:

"It may be said that, inasmuch as its property was not assessed above its true value, it had no right to complain. But this is not true. It had the right to demand that no unequal burden be imposed upon it by taxation. The duty to contribute to the support of the state government by the payment of taxes is imposed upon all persons owning property subject to taxation. The constitution provides that this burden shall be apportioned among them according to the value of their property, to be ascertained as directed by law. When, therefore, the property of a few is taxed according to its value, and of all others at one-half its value, then the few are required to contribute double their portion of the burden. This is manifestly a wrong, and justice demands that it be redressed whenever it can be done conformably to the laws. * * *

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In this case the county court acquired jurisdiction, by the appeal of the bridge company, to grant relief from the illegal, erroneous, or unequal assessment of appellant's property, but did not acquire the right or authority to make the valuation of all real property in the county for the purposes of taxation, in all cases in which it had not been done, the true value, by raising it, or to change the valuation of any property except the bridge. The assessment of no property can be increased without notice first given to the owner by the board of equalization. How, then, was the county court to afford relief to appellant? The only relief it could have afforded was to reduce the valuation so as to make it conform to the standard adopted in the valuation of the other real property in the county, or the average valuation of such property. Why should not this relief be granted? The valuation of property is only a constitutional means adopted for the purpose of making the burdens of government bear upon each taxpayer in proportion to the value of his property. The relief suggested accomplishes that end in this case. By granting it, a constitutional right will be enforced, and by denying it, will be withheld, because the means devised for its enforcement were not adopted. By pursuing the latter course, the constitution will be made the means of defeating itself, by the imposition of unequal burdens. To avoid this result, the relief should be granted."

In the case of Board of Sup'rs of Bureau Co. v. Chicago, B. & Q. R. Co., 44 Ill. 229, the appeal was a direct appeal from the board of supervisors, which assessed the value of the property of the railroad company. It appeared that the valuation of property of individuals, except that of the railroad company ranged from one-fifth to one-third, while that of the railroad company ranged from one-third to one-half; and the appellate court decided that the assessment of the railroad property must be at the same percentage of the real value as that of individuals. The constitution of Illinois required the general assembly to provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property; such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct, and not otherwise. The act to carry out this section provided that each separate parcel should be valued at its true value in money. The court held that it was the duty of the supervisors to impose the same percentage of assessment upon the railroad company as had been assessed by the assessors upon the property of individuals. The court said:

"It is no argument to urge that the fault is with the assessors in the case of individuals, and with railroad companies in making out their schedules for the county clerk. If the assessors violate their duty, are railroad companies to be the sufferers? If they neglect to act fully up to all the requirements of the law, is that any reason why A. should pay forty per cent. more taxes, in proportion to value, than B.? The rule adopted by the assessors in this state has grown into a custom, and has been tacitly sanctioned by every department of the government for a long course of years, and it is now too late to challenge it. * * * Would not the sense of justice of every man in this community be outraged by allowing this or any other depreciation to one class of people, and demanding of another a higher tax on a similar article of the same actual value? The proposition cannot commend itself to the favor of any just man, and can receive no countenance in a court of justice. It is an admitted fact on both sides to this controversy that the property of no one owner in the county of Bureau has been taxed on its real value, and that the per cent. added by the board of supervisors to the valuation of the property of appellees imposes on them a greater proportionate burden than the law requires them to bear. We are of this opinion, and therefore consider the action of the board unfounded in justice, and in direct opposition to the

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constitution. The great and attractive feature of uniformity has been disregarded by the board, and appellees victimized. It may be very desirable that the greatest share of the public burdens shall be borne by these corporations, but, until there be a radical change in our fundamental law, it cannot be done. They stand on the platform of equality before the law, and no greater burden for the support of government can be imposed upon them than can be placed on the individual taxpayer."

In the case of Chicago, B. & Q. R. Co. v. Board of Com'rs of Atchison Co., 54 Kan. 781, 39 Pac. 1039, the railroad company filed a bill in equity to enjoin the collection of 75 per cent. of its taxes levied against it in Atchison county. The railroad was assessed by a state board of railroad assessors, who assessed the road at its true and actual value. In the county of Atchison all the city and township assessors, for the purpose of carrying on an equal basis the assessment, agreed among themselves to assess all property 25 per cent. of the true value of the same. The railroad property was thereupon assessed at the true value, while the property of individuals and other corporations in Atchison county was assessed at 25 per cent. of its real value. The constitution of the state required that the legislature should provide for a uniform and equal rate of assessment and taxation. The legislature provided that all property should be assessed at its true value. The court said:

"This unequal valuation was not the result of an accidental omission of property from the assessment list, or an accidental valuation of property at more or less than its true value. The state board of railroad assessors valued the railroad property in Atchison county, for taxation, at its true value; but the city and township assessors of that county, by an agreement between themselves, assessed all the other property of the county at 25 per cent. of its true value. Thus, by concerted action, the statute of the state was flagrantly disregarded. * * * There has been gross discrimination in the taxation of the railroad property. The law has not been observed. The taxes complained of are not equal and uniform. While exact equality and uniformity cannot be had, and while mistakes and omissions by assessors may not in all cases be the subject of adequate remedy in the courts, yet for the gross injustice and violation of the law complained of there ought to be some remedy. The plaintiff below, having tendered all of the state taxes, and also its just share of the county and other taxes, is entitled to have enjoined the collection of the illegal excess."

As has already been said, there are cases in which the other horn of the dilemma has been taken, the injustice to the complaining class of taxpayers has been allowed to continue, and the violation of constitutional or statutory uniformity and equality has gone on unhindered, in order that the letter of the law may be preserved while its spirit is flagrantly broken. Wagoner v. Loomis, 37 Ohio St. 571; Central R. Co. v. State Board of Assessors, 48 N. J. Law, 1, 2 Atl. 789. See, also, City of Lowell v. County Com'rs, 152 Mass. 372, 25 N. E. 469.

We are relieved from a further discussion of the question by the decision of the supreme court of the United States in the case of Cummings v. Bank, 101 U. S. 153. In that case the assessors of real property, the assessors of personal property, and the county auditor (who was the assessing officer of the first instance for bank shares) of the county where the complainant bank was situated agreed to assess real and personal property at one-third its value, and money

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or invested capital at six-tenths its value. This agreement was in violation of the statutes under which they were acting, which required assessments to be at the true value in money. The state board of equalization for banks increased the assessment of complainant's bank shares to their full market value. The state board had no power to equalize bank shares with real or personal property, and, in assessing these bank shares at their full value, it was following the exact course prescribed by statute, and the statute was passed in accordance with the constitution of Ohio, which requires the legislature to pass laws taxing all property "by uniform rule at its true value in money." This action was brought by the complainant bank to enjoin the county treasurer from collecting the tax on the assessment against its shares which had been certified down by the state board of assessors. The circuit court of the United States enjoined the treasurer from collecting tax on a valuation greater than one-third of the real value of the shares. The effect of this order was to annul an assessment by the state board of equalization which was strictly in accordance with the letter of the statute governing it in the discharge of its duties, and which was equally in accord with the standard of value for assessment fixed by the constitution of the state. The decree of the circuit court was affirmed by the supreme court on the principle stated by the court as follows:

"When a rule or system of valuation is adopted, by those whose duty it is to make the assessment, which is designed to operate unequally, and to violate a fundamental principle of the constitution, and when the rule is applied, not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power."

It should be noted that, although the complainant was a national bank, the case did not arise under the act of congress, but was expressly based on the right of the complainant, under the state constitution, to uniformity of taxation according to value. The taxing laws of Ohio did not provide one tribunal of appeal for equalizing values of all classes of property, and it was objected on behalf of the bank that, in view of the constitutional injunction upon the legislature to pass laws taxing all property by uniform rule at its true value in money, a system in which different classes of property were assessed by independent tribunals, with no common revisory authority, must be invalid, because so poorly adapted to secure uniformity. The court did not yield to this argument, however. Mr. Justice Miller, delivering the opinion of the court, gave its reasons for not doing so as follows:

"But there are two reasons why we cannot so hold: First, it might be that in every instance the result would be the valuation of bank shares at a lower ratio in proportion to their real value than that of any other property, and therefore plaintiff would have no ground of complaint. And, secondly, what is more important, if these original valuations and equalizations are based always, as the constitution requires, on the actual money value of the property assessed, the result, except as it might be affected by honest mistakes of judgment, would necessarily be equality and uniformity, so far as it is attainable. So that while it may be true that this system of submitting the different kinds of property subject to taxation to different boards of assessors and equalizers, with no common superior to secure uniformity of

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the whole, may give opportunity for maladministration of the law, and violation of the principle of uniformity of taxation and equality of burden, that is not the necessary result of these laws, or of any one of them; and a law cannot be held unconstitutional because, while its just interpretation is consistent with the constitution, it is unfaithfully administered by those who are charged with its execution. Their doings may be unlawful, while the statute is valid. The evidence, we are compelled to say, shows this to be true of the case before us."

The justice then discussed the facts, to show that the laws had been unfaithfully administered by those charged with their execution, and that as the only method provided in the system by which constitutional uniformity was to be secured, namely, by taxing all property at its true value in money, though required by statute, had been departed from by the administrators of the law in assessing other classes of property than that held by the complainant, equity might relieve complainant from his unequal burden thus placed on him by enjoining taxation on more than one-third of the assessment against him, though his property had been only taxed at its true value. After commenting on the widespread custom or rule in many states to undervalue real estate, growing out of the effort of the landowner to produce something like equality of burden with personal property which escapes taxation by being hidden, the justice concluded:

"But, whatever may be its cause, when it is recognized as the source of manifest injustice to a large class of property, around which the constitution of the state has thrown the protection of uniformity of taxation and equality of burden, the rule must be held void, and the injustice produced under it must be remedied, so far as the judicial power can give remedy."

The case before us cannot in any material respect be distinguished from the Cummings Case. In this case, as in that, the injunction sought is against the enforcement of an assessment upon complainant's property which was made at the true value of the property, in accordance with the mandate of the constitution and statute, by assessing officers who had not themselves discriminated against complainant's property by undervaluing other species of property, and who were not themselves guilty of any fraud. In this case, as in that, the unjust operation of the assessment grows out of the systematic and intentional undervaluation of other species of property by assessors who are not responsible for the assessment complained of. In this case, as in that, the effect of the injunction is to compel certain assessors of the state to reduce their assessment to the illegal standard of valuation adopted by different and unfaithful assessors of other species of property, and is justified by the result that in this way is secured something like the uniformity which is the sole purpose of the constitution. It has been pressed upon us that no such preconcert of action by the assessing officers, and no such uniform rule of undervaluation, have been shown in this case as appeared in the Cummings Case, and that upon these circumstances the Cummings Case turned. We have already found, from the evidence, that there is an intentional undervaluation of property in each county, and that this is uniform as to all real and personal property, and results from a clear understanding between the as-

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sessors and county boards of equalization, who have a common motive for the reduction. More than this, it is clearly shown that the state board of assessors and equalizers in 1896 intentionally equalized all real estate in the state at 75 per cent. of its true value for the taxation of the year 1897. Could preconcert be clearer than this? It is further said that, before the remedy pursued in the Cummings Case can become applicable, it must appear that the undervaluation of one species of property was adopted as a rule of action by the assessors for the fraudulent purpose of discriminating against the complaining taxpayer and his class, and that no such case is presented to this court. Now, it is true that, before equity will relieve in such a case, it must appear that the assessing officers whose acts of undervaluation create the unjust burden must intentionally and habitually violate the law, by assessing property at a less valuation than that which they know to be its true value; but it is not true that they must be shown affirmatively to intend to injure complainant and his class of taxpayers in so doing. It is true that in the Cummings Case the unfaithful assessors, or some of them, did undervalue both real and personal property, and money capital, in which were included bank shares, at different percentages of their true value; but the assessment of which complaint was made was not the work of these assessors at all, but, as here, of a state board of equalization. An intentional undervaluation of a large class of property, when the law enjoins assessment at true value, is necessarily designed to operate unequally upon other classes of property to be assessed by other taxing tribunals, who, it may be presumed, will conform to the law. In the case at bar the county assessors and board of equalization of each county have been actuated in their violations of the law by the desire to reduce, as far as may be, their county's share of the state burdens. Their undervaluations of property have been uniform as to all property in their county but railroads. They could not but know that such undervaluation must work an injustice against the property of railroads, if assessed at its true value by a state board, and taxed for county and state purposes on that basis. In this sense, the rule of undervaluations adopted in each county is necessarily "designed to operate unequally," within the meaning of Mr. Justice Miller in the Cummings Case. The ratio decidendi of that case is to be gathered from the facts, and the language of the opinion is to be interpreted in the view of the facts. The case has been commented on by the supreme court in a number of subsequent cases, but it has never been modified or overruled.

Bank v. Kimball, 103 U. S. 732, was a bill to enjoin the collection of taxes. The bill was dismissed on demurrer. The bill averred, in effect, that complainant's bank shares were assessed at less than their value, by 50 per cent., but that other property was assessed at less even than this, and that for this reason no tax should be paid on the bank shares. Referring to the Cummings and other cases, Mr. Justice Miller, who spoke for the court, said:

"It is held in these cases that, when the inequality of valuation is the result of a statute of the state designed to discriminate injuriously against any

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class of persons or any species of property, a court of equity will give appropriate relief, and also where, though the law itself is unobjectionable, the officers who are appointed to make assessments combine together, and establish a rule or principle of valuation, the necessary result of which is to tax one species of property higher than others, and higher than the average rate, the court will also give relief. But the bill before us alleges no such agreement or common action of assessors, and no general rule or discriminating rate adopted by a single assessor, but relies on the numerous instances of partial and unequal valuations, which establish no rule on the subject."

In Supervisors v. Stanley, 105 U. S. 305, the averment of the petition of a national bank seeking to recover taxes claimed to have been illegally paid was that the assessment of its shares was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the state of New York. In granting a right to amend and have a new trial, Mr. Justice Miller, speaking for the court, said:

"If by this it is supposed that a few individual instances may be shown of partial assessments favoring citizens, as compared with the national banks. we think it is erroneous. But if it is intended to allege that, apart from the question of the right of the shareholder to deduct for his debts,—a question which in this case was disposed of, and was in issue,—it can be proved that the assessors habitually and intentionally, or by some rule prescribed by themselves or by some one whom they were bound to obey, assessed the shares of the national banks higher, in proportion to their actual value, than other moneyed capital generally, then there is ground for recovery, and a hearing as to that should be granted."

In Stanley v. Supervisors, 121 U. S. 550, 7 Sup. Ct. 1239, Mr. Justice Field said:

"When the overvaluation of property has arisen from the adoption of a rule of appraisement which conflicts with a constitutional or statutory direction, and operates unequally, not merely on a single individual, but on a large class of individuals or corporations, a party aggrieved may resort to a court of equity to restrain the exaction of the excess, upon payment or tender of what is admitted to be due. This was the course pursued and approved in Cummings v. Bank, 101 U. S. 153."

In Bank v. Perea, 147 U. S. 87, 13 Sup. Ct. 194, the law of New Mexico required property to be assessed at its cash value. The plaintiff's property was originally assessed at its full value, while the other property was assessed at 70 per cent. It appealed to the board of equalization, which reduced the assessment to 85 per cent. Mr. Justice Brewer said:

"Surely, upon the mere fact that other property happened to be assessed at thirty per cent. below the value, when this did not come from any design or systematic effort on the part of the county officials, and when the plaintiff has had a hearing as to the correct valuation on appeal before the board of equalization, the proper tribunal for review, it cannot be that it can come into a court of equity for an injunction, or have that decision of the board of equalization reviewed in this collateral way."

We find nothing in these cases which should change our view, already expressed, of the effect of the Cummings Case. They merely emphasize the point that equity will not relieve against an assessment merely because it happens to be at a higher rate than that of other property; that such inequalities, due to mistake, to the fallibility of human judgment, or to other accidental causes, must be borne, for the reason that absolute uniformity cannot be obtain-

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ed; that, in other words, what may be called "sporadic cases of discrimination" cannot be remedied by the chancellor. He can only interfere when it is made clear that there is, with respect to certain species of property, systematic, intentional, and unlawful undervaluations for taxation by the taxing officers, which necessarily effect an unjust discrimination against the species of property of which the complainant is an owner. The reason for the distinction is obvious. The occasional and accidental discriminations are inevitable in every assessment, and are not likely to continue, because not the result of an illegal purpose on the part of any one. If equitable interference in such cases could be invoked, the obstruction to the collection of taxes would be so frequent as to be intolerable. More than this, an action to enjoin a tax is a collateral attack upon the judgment of a quasi judicial tribunal; and it cannot be justified except on the ground of an obvious violation of law, or something equivalent to fraud. It does not lie where the injury complained of arises only from the erroneous, but honest, judgment of the lawfully constituted tax tribunal. The interference by the chancellor in the case at bar and in the Cummings Case rests on something equivalent to fraud in the tribunal imposing the tax. The various boards whose united action is by law intended to effect a uniform assessment on all classes of property are to be regarded as one tribunal, and the whole assessment on all classes of property is to be regarded as one judgment. If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law, by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the fully-assessed property. And this is true although the particular board assessing the complainant's property may have been wholly free from fault of fraud or intentional discrimination. Therefore the injunction might issue against the assessment upon the fully-assessed property, as void altogether, until a new and uniform assessment upon all property according to law could be made. And such is the rule in some courts. Weeks v. Milwaukee, 10 Wis. 263; Hersey v. Board, 16 Wis. 192; Smith v. Smith, 19 Wis. 619. The inequity of allowing the taxpayer to escape altogether, and the intolerable inconvenience to the public in the delay incident to such a course, however, lead a court of equity to shape its order so as to allow only so much of the fraudulent judgment to be enforced against the complainant as may be done without imposing on him any inequality of tax burden. We reach the conclusion, therefore, that the circuit court was right in enjoining the unjust, unequal, and (in the sense already explained) fraudulent assessment against the complainant; but we think the order should have required, as a condition of the issuing of the injunction, that the complainant should pay to the proper officers a tax upon the 75 per cent. of the assessment made by defendants. The evidence, taken with the averments of the bill, does not establish that the discrimination against the complainant's property really exceeds this. The condition imposed

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by the circuit court was the payment of the taxes on the assessment for 1897 by the state board of assessors and equalizers. That assessment, as we have found, was annulled by the act of 1897. The order of the court is that the order of injunction be modified as above stated, and that, as thus modified, it be affirmed, at the costs of the appellants.

(88 Fed. 375.)

BEARD v. INDEPENDENT DIST. OF PELLA CITY.

(Circuit Court of Appeals, Eighth Circuit. July 2, 1898.)

No. 1,052.

1. FEDERAL AND STATE COURTS—TRUST FUNDS IN INSOLVENT NATIONAL BANK—RULE OF PROPERTY.

   The right to fasten a special trust upon funds held by the receiver of an insolvent bank in Iowa not having been created by any statute of that state, but depending upon the general principles of law and equity applicable to the circumstances, decisions of the supreme court of that state in relation thereto, if not in accord with the decisions of the supreme court of the United States or the decided weight of authority, do not constitute a rule of property binding on the federal courts.[1]

2. INSOLVENT BANKS—FOLLOWING TRUST FUND.

   In order that a trust fund may constitute a preferential claim against the funds of a national bank in the hands of a receiver, it must appear that these funds were actually augmented by the receipt of the trust fund. And if the trust fund was created merely by a check on the same bank drawn by a general depositor in favor of the trustee, the amount of which was then shifted to the latter's credit, there is no right to a preference.

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

This was a proceeding in equity instituted by the independent district of Pella city against R. R. Beard, receiver of the First National Bank of Pella, for the purpose of compelling the receiver to recognize as a trust fund, and pay in full, the amount of a balance deposited by the treasurer of the district. There was a finding and decree in favor of complainant in the circuit court, and the receiver appeals.

A. B. Cummins, for appellant.

P. H. Bousquet, I. M. Earle, and S. F. Prouty, for appellee.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. From the record in this case it appears that for some years prior to June, 1895, the First National Bank of Pella, a corporation created under the provisions of the act of congress known as the "National Bank Act," carried on at Pella, Iowa, a banking business until about June 1, 1895, when it was declared to be insolvent, and R. R. Beard, the appellant, was duly appointed receiver

[1] As to state laws as rules of decision in federal courts concerning rules of property, see section IX. of note to Wilson v. Perrin, 11 C. C. A. 84, and section VI. of the supplementary note to Hill v. Hite, 29 C. C. A. 562.

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thereof by the comptroller of the currency. It further appears that for years previous to the appointment of the receiver the treasurer of the independent school district of Pella city had been in the habit of depositing the funds of the school district in the named bank; the account on the books of the bank being headed, "Treasurer of Independent School District." The moneys thus deposited were not received by the bank as a special deposit, but were treated the same as the moneys paid in by other depositors; being intermingled with the general funds of the bank. When the bank failed, and was placed in the hands of a receiver, the account showed a balance due to the treasurer of the school district of $4,676.25; and thereupon the independent district brought this proceeding in equity for the purpose of compelling the receiver to recognize the amount as a trust fund belonging to the district, and to pay the same out of the moneys in his hands before paying any dividends to the creditors of the bank, —it appearing that the cash assets of the bank coming into his hands on June 1st amounted to $8,729.93. Upon the hearing in the circuit court it was decreed that complainant was entitled to the relief sought, and that the receiver must pay the amount due the independent district before making a dividend to the other creditors; and the receiver now seeks a reversal of the decree thus entered. The grounds for the conclusion reached bv the trial court are very fully and ably set out in the opinion handed down, and reported in 83 Fed. 5, in the course of which the leading cases upon the question of the right to follow and recover trust funds are cited and commented on; and the conclusion is reached that there exists a conflict between the rulings of the supreme court of Iowa and the current of authority in the courts of other states and of the United States, and that, if free to view the question on its merits, the ruling would be against the right to a preferential claim existing in the school district, but, in deference to the rulings of the supreme court of Iowa, the court would hold the right to a preference to be established.

The only provision of the statutes of Iowa which is involved in this case is section 1747 of the Code of Iowa of 1873, which enacts that:

> "The treasurer shall hold all moneys belonging to the district and pay out the same on the order of the president, countersigned by the secretary, and shall keep a correct account of all expenses and receipts in a book provided for the purpose."

Construing this section, the supreme court of Iowa holds that under its provisions the treasurer of a school district holds the money of the district as a trustee; that he is not authorized to deposit the same in a bank, and by so doing the character of the fund is not changed, and the right exists in the district to follow this trust fund and assert title thereto. District Tp. v. Morton, 37 Iowa, 551; District Tp. v. Smith, 39 Iowa, 10; District Tp. v. Hardinbrook, 40 Iowa, 130; Independent Dist. v. King, 80 Iowa, 497, 45 N. W. 908. The statute does not deal with the question when, and under what circumstances, a right to a trust fund can be successfully asserted against the rights of third parties. All that is established by the construction of the statute by the state supreme court is that under its provisions a district treasurer holds the school funds as a trustee, and

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that he has no legal right to deposit the funds in a bank; but the statute does not undertake to declare that if the money is thus deposited, and is intermingled with the general funds of the bank, the right of the school district to payment out of the general fund is paramount to the rights of all other creditors. If such right exists, it is not created by the statute, but is based upon the general principles of law and equity applicable to the circumstances; and the rulings of the supreme court of Iowa are not conclusive upon the latter question, nor can it be rightfully said that they constitute a rule of property which other courts are bound to follow; and while we concur with the trial court in the general views expressed, touching the desirability of avoiding conflicting decisions between the state and federal courts, we cannot agree with the learned judge below in holding that this consideration requires a decision of the question involved in this case in accordance with the rulings of the supreme court of Iowa, if the same are not in accord with the rules laid down by the supreme court of the United States, or established by the decided weight of authority in the cases decided by the courts of other states. We must not lose sight of the character of this proceeding. The First National Bank of Pella was created under the laws of the United States; and its powers, rights, duties, and obligations, so far as they are dependent upon statutory enactment, are derived from the acts of congress, and not from the statutes of Iowa. Becoming insolvent, the bank was put into liquidation under the provisions of the act of congress, and the receiver was appointed by the comptroller of the currency; and, under the authority conferred on him by the statutes of the United States, he has taken possession of the assets of the bank, and in the distribution thereof he is controlled by the laws of the United States. The present bill was filed by the complainant against the receiver in his official capacity, and for the purpose of establishing a preferential claim on the assets of the bank in his hands, in favor of complainant; and the real question is whether the receiver is bound to obey the law as laid down by the supreme court of the United States, or by the supreme court of Iowa, upon the point at issue, assuming for the moment that these courts are at variance thereon. The argument in favor of uniformity of decision, upon which reliance was placed by the trial court, makes in favor of uniformity of ruling among the courts which may be called upon to direct the distribution of the assets of insolvent national banks, which can only be secured by following in all cases the rule laid down by the supreme court of the United States. The question for decision is, what rule should be followed by a receiver of a national bank in distributing the assets of the bank, which have come into his hands under the provisions of the laws of the United States, in cases wherein it appears that trust funds have been received by the bank in the course of its business? The general question of the right to follow trust funds was fully considered by Mr. Justice Bradley in Frelinghuysen v. Nugent, 36 Fed. 229, and the conclusion reached was stated as follows:

"Formerly the equitable right of following misapplied money or other property, in the hands of the party receiving it, depended upon the ability of

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identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it was held, as the better doctrine, that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over other creditors of the possessor."

Counsel for appellant and appellee concede that the foregoing extract from the opinion of Mr. Justice Bradley fairly states the rule recognized by the supreme court of the United States, which in Peters v. Bane, 133 U. S. 670, 10 Sup. Ct. 354, quoted the same approvingly; and, without further citation of authorities, we may accept the same as a succinct statement of the rule now in force in the courts of the United States.

It is claimed that the supreme court of Iowa has extended the rule as above stated, by holding that where trust funds have been intermingled with the general assets of an insolvent estate, thereby increasing the amount thereof, the person to whom the trust funds belong has a preferential lien, not only upon the specific fund into which it is traced, but upon the general assets of the insolvent estate; and, in support of this claim, reliance is placed on the cases of Independent Dist. v. King, 80 Iowa, 498, 45 N. W. 908, and Dist. Tp. of Eureka v. Farmers' Bank, 88 Iowa, 194, 55 N. W. 342. It cannot be questioned that the general language found in the opinion in the former case gives support to the contention that it was intended to lay down the broad proposition that, as against the general creditors, the owner of a trust fund passing into the hands of another who becomes insolvent, will have a preferential lien upon the estate of the insolvent; but the decision in the subsequent case of Dist. Tp. of Eureka v. Farmers' Bank, supra, clearly shows that such is not the doctrine intended to be enunciated by that court. In the latter case one Taylor was carrying on a banking business under the name of the Farmers' Bank of Fontanelle. On the 10th day of December, 1890, the bank being insolvent, Taylor made a general assignment for the benefit of creditors. It appeared that the treasurer of the school district for some years had deposited the money of the district in Taylor's bank; there being to his credit, when the assignment was made, the sum of $2,303. The school district brought suit in the district court of Adair county, asking that the amount be declared to be a trust fund, and be decreed to be a preferred claim against the property transferred to the assignee of the owner of the bank by the deed of assignment, and the district court entered a decree providing for the payment of the trust money out of any funds which should come into the hands of the assignee. Upon appeal the supreme court reversed the decree in this particular because it appeared that the deed of assignment conveyed to the assignee real property, to the acquisition of which the money of the school district had not contributed, and in the course of the opinion it is said:

"In Independent Dist. v. King, 80 Iowa, 498, 45 N. W. 908,—a case in many respects like this,—the identical money deposited was not shown to have been delivered to the assignee; and it was said that, if a trust for the amounts de-

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posited were established, 'it must be on the ground that the deposits must be held to have increased the estate of the insolvents, and that the balance due is represented by an increase now in the hands of the assignee.' * * * It is insisted, however, that the trust fund has been traced into the estate of the insolvent, which is in the hands of the assignee. We do not think it is necessary to trace the deposit into any specific property in the hands of the assignee, in order to establish a trust, but it should be shown—presumptively, at least—that the estate in his hands has been augmented by the trust fund. The equities of plaintiff, as against property to which its money contributed nothing, directly or indirectly, are no greater than those of the general creditor."

Thus we have in this case a construction of the opinion given in the earlier case of Independent Dist. v. King; and it is made clear, beyond question, that the supreme court of Iowa does not hold the rule that a trust fund may be declared to be a preferential lien upon the entire estate of an insolvent, into whose hands the trust fund may have come, but such preferential lien will be held to exist against any fund or property coming into the hands of an assignee, the amount or value of which has been augmented by reason of the trust fund coming into possession of the assignor. It is difficult to see wherein the rule thus enunciated and applied by the supreme court of Iowa differs from that recognized by Mr. Justice Bradley in Frelinghuysen v. Nugent, supra, and approved by the supreme court, to the effect that confusion with other like property, as by intermingling money in a common fund, does not destroy the equity, but converts it into a charge upon the entire mass with which the trust fund has been confused. The foundation of the right on part of the owner of a trust fund to a preference over general creditors in payment out of a fund or estate that has passed to the assignee or receiver of an insolvent person or corporation is, that the trust fund has been wrongfully confused or intermingled with the property of the insolvent, or has been used to increase the value of property, thereby increasing the amount or value of the funds or estate passing into possession of the assignee or receiver; that, if this intermingling had not taken place, the fund passing to the receiver would have been so much less; that the creditors have only the right to subject the property of the debtor to the payment of their claims, and therefore the creditors cannot complain if the total fund coming into the hands of the receiver is reduced by the amount necessary to make good to the owner of the trust fund the sum which was wrongfully used in augmenting the fund or property passing to the receiver. Unless it appears that the fund or estate coming into possession of the receiver has been augmented or benefited by the wrongful use of the trust fund, no reason exists for giving the owner of the trust fund a preference over the general creditors, and this we understand to be the doctrine recognized by the supreme court of Iowa and the supreme court of the United States alike.

In the bill filed in this case it is averred that when the bank closed its doors it had on hand cash to the amount of $8,000, which passed into possession of the receiver; it being further averred that the trust money belonging to the school district, and amounting to $4,676, formed part of this cash fund. Upon this question of fact the rights of the complainant depend. If this fund, coming into pos-

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session of the receiver as part of the assets of the insolvent bank, includes the money belonging to the school district, then the district is entitled to a preference in payment therefrom over the creditors of the bank; but, unless it appears that this fund does include such trust fund, the right to a preference does not exist. The evidence shows that when the bank closed its doors, on June 1, 1895, all the money credited on account to the independent district had been drawn out, and the balance of $4,676, claimed to be due, grows out of two credits entered on the account,—one for $614, under date of May 6, 1895, and one for $4,340, under date of May 13, 1895; and it is admitted that these entries do not represent cash then actually paid into the bank, but represent checks given on the bank itself, the amount of each being charged on the books of the bank against the drawer of the check, and then entered to the credit of the treasurer of the school district. The check for $4,340 was drawn by the treasurer of Marion county in favor of the treasurer of the school district, and represented taxes collected for school purposes for the benefit of the independent district of Pella. The account kept with the treasurer of the independent district, on the books of the bank, shows that money was drawn out of the bank from time to time for the use and benefit of the school district; and it further appears that were it not for the credit given by reason of the two checks drawn May 6th and May 13th, and aggregating $4,954, the account would have been overdrawn, and the treasurer of the district would have been in debt to the bank in the sum of $614. It thus appears that the balance of $4,676 now claimed by the school district is not composed of money actually paid into the bank on May 6th and 13th, whereby the cash assets of the bank were increased to that extent, but this balance is made to appear to be due to the school district by entries upon the books which neither increased nor diminished the cash held by the bank. That this is true will appear from an examination of the daily balance book of the bank, which is in evidence. This shows that on the 11th of May the total cash held by the bank amounted to $7,949, and the amount then to the credit of the school district was $707. May 12, 1895, being Sunday, no entry appears for that day. On May 13th the cash balance was $8,436, or an increase of $487 over the amount on hand on Saturday, May 11th. The amount to the credit of the school district on the 13th was $5,047, or an increase over the amount on Saturday, May 11th, of $4,340,—just the amount of the check drawn by the treasurer of Marion county on the bank, and by it credited to the account of the school district; but the amount of cash held by the bank was not increased by this amount, but remained at just the figure it would have shown if this interchange of credits between the treasurer of Marion county and the treasurer of the school district had not taken place. Under these circumstances, can it be successfully maintained that the cash fund coming into the hands of the receiver has been augmented by the addition thereto of a trust fund belonging to the school district, which may be subtracted from the fund without infringing on the rights of the general creditors? The relation existing between the bank and the treasurer of Marion county was simply that of debtor and creditor.

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In order to pay the amount of taxes due to the school district, the treasurer of the county drew his check on the bank for the sum of $4,340, and delivered it to the treasurer of the school district. The fund on which the check was drawn was not a trust fund, and the delivery of the check to the treasurer of the school district did not change the character of the account against which it was drawn. If, after the acceptance of the check by the treasurer of the school district, but before its presentation, the bank had failed and closed its doors, it could not be claimed that the bank held the sum in trust for any one. The only obligation resting on the bank was to pay the check on presentation, and, if not paid, the bank would be indebted for the amount, not as a holder of a trust fund, but as an ordinary debtor. It is claimed in argument that the court must treat the case just as though the treasurer of the school district had presented the check, had obtained the money thereon, and had then deposited the money in the bank as the money of the school district, but this was not in fact done; and as against the creditors, whose money in fact created the cash amount coming into the hands of the receiver, why should fiction be resorted to in order to sustain a preference on behalf of the school district to payment out of a fund not augmented in fact by any sum belonging to the district?

The object of the bill filed in this case is to obtain a preferential payment of the sum of $4,976 out of the cash fund coming into the hands of the receiver as part of the assets of the bank, and the foundation of the right to a preference is the claim that this fund had been augmented and increased by the addition thereto of a trust fund belonging to the school district. The evidence clearly shows that if the treasurer of the school district had never deposited a cent in the bank, or had closed his account therewith on the 5th day of May, 1895, the sum of money coming into the hands of the receiver on June 1st would have been just the same that did in fact come into his hands; and the evidence therefore does not prove that the cash fund in the hands of the receiver has been augmented or increased by the addition thereto of a trust fund belonging to the school district. If the evidence showed that there had been in the hands of the treasurer of the school district a sum of money which he in fact placed in the bank as an addition to the cash fund which subsequently passed into the hands of the receiver, the school district could make claim to this amount as a trust fund, without being required to prove the methods by which the money came into the hands of its treasurer; but, as the evidence in this case clearly shows that the cash fund coming into the receiver's hands does not include any cash actually paid into the bank by the treasurer of the school district, the complainant, in order to show that it has any claim against the bank, is compelled to avail itself of the action of its treasurer in accepting from the treasurer of Marion county a check drawn on the bank, and against an ordinary account, not containing trust funds, and in having the amount of the check credited to the treasurer of the district. If the treasurer of the district had presented the check to the bank for acceptance, and it had been accepted or certified as good by the bank, but before payment the bank had failed, certainly, if the school

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district desired to avail itself of a claim against the bank, it could only do so by assuming the position of its treasurer, which would be that of a creditor of the bank, holding an accepted or certified check. It certainly could not assert that the accepted check had become a trust fund, which must be paid in preference to the debts due other creditors. By accepting the check, the bank would bind itself for the payment of the amount thereof; and, in effect, that was all that was done in this case, in that when the check was drawn the amount thereof was credited up to the account of the treasurer of the school district, and by so doing the bank acknowledged the check to be good, and became bound to pay the amount thereof when called for by the treasurer of the district. The school district can wholly ignore all these dealings between its treasurer and the bank, and, under the decisions of the supreme court of Iowa, can hold its treasurer and his sureties for the amount of school funds coming under his control; but when, as in this case, the school district endeavors to establish a claim against the bank, it ought not to be allowed to avail itself of the benefit of the transactions between its treasurers and the bank, but avoid their obligations. This case is not one wherein it is made to appear that the school treasurer and the bank were in collusion to commit a fraud upon the district, and the actual contest is between the school district and the general creditors of the bank. It is open to the school district to assume the position occupied by its treasurer, and, by acknowledging his acts, become a creditor of the bank for the balance shown to be due to the school treasurer; but when the district attempts to avoid the position of a creditor, and to assume that of the owner of a trust fund, and as such to assert a preferential right to payment in full out of the cash fund coming into the hands of the receiver, to the detriment of the general creditors, it ought to be held to satisfactory proof of the fact upon which the right to a preference rests, to wit, that the fund coming into the receiver's hands has been augmented and increased by the addition thereto of the trust money, not as a matter of inference, nor as a result of mere entries on books of account, but because the fund or property against which the preference is sought to be enforced has been in fact augmented or benefited by the addition thereto of the trust fund.

To illustrate the situation, let it be assumed that on the 13th day of May, when the check of the treasurer of Marion county was entered upon the books of the bank to the credit of the treasurer of the district, there was no cash then in the bank. Certainly the drawing of the check, and the entry thereof to the credit of the school treasurer, would not have placed in the hands of the bank any cash whatever; and, had the bank then closed its doors, it would be true that the school district could assert, as against the bank, that the amount due it was a trust fund, yet it would be but a barren claim, because there would be no fund in the hands of the receiver against which a preferential claim could be asserted. Assume, however, that, before the bank closed its doors, some third party had made a deposit of $5,000 in cash, and this sum had passed to the receiver, as part of the assets of the bank; would a court of equity be justified in hold-

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ing that under such circumstances the school district could assert a right to payment in full out of this fund, to the exclusion of the creditor of the bank who had created the fund by depositing it in the bank? In the supposed case it would appear, beyond question, that the trust funds belonging to the district had not aided in creating or augmenting the cash fund coming into the receiver's hands, and clearly it would be inequitable to give preference to the claim of the school district over that of the party whose money had in fact created the fund. In substance, that is the situation disclosed by the evidence in this case. As already stated, on the 5th day of May, 1895, the treasurer of the school district had no funds in the hands of the bank, but, on the contrary, the account was overdrawn. On the 6th and 13th days of May, credits on the account were entered, of checks drawn on the bank, which did not add one dollar to the cash in hand or other assets of the bank. The cash fund which passed into the receiver's hands is the balance of the funds on hand on May 5th, of which no part belonged to the school fund, the treasurer's account being then overdrawn, and the cash paid in since May 5th, less the amount paid out; all of the cash paid in coming from sources other than from the treasurer of the school district. It is not sufficient for complainant to show that the account carried on the books of the bank under the heading, "Treasurer of the Independent School District," represented a trust fund, and that the amount shown to be due thereon from the bank was increased by crediting up the checks of the county treasurer. The point at issue is not between the school district and the bank, but it is between the school district and the creditors of the bank, represented by the receiver; and, to entitle the school district to enforce a prior equity or claim against the cash fund in the hands of the receiver, it must prove that this fund has been augmented by the addition thereto of trust funds belonging to the district, and, for the reasons stated, we hold that this has not been done; and therefore complainant is not entitled to a priority of payment out of the funds in the receiver's hands, nor to a prior lien upon the general assets of the bank. The decree appealed from is reversed, and the case is remanded to the circuit court with instructions to dismiss the bill on the merits.

(88 Fed. 435.)

WRIGHTMAN v. BOONE COUNTY.

(Circuit Court of Appeals, Eighth Circuit. June 27, 1898.)

No. 1,038.

1. CONSTRUCTION OF STATUTES—RETROSPECTIVE LEGISLATION.
   A statute is not to be given a retrospective effect unless it clearly and unequivocally appears that such was the legislative intent.
2. LIMITATION OF ACTIONS—REVIVOR OF JUDGMENT—RETROSPECTIVE LEGISLATION.
   Act Ark. April 8, 1891, providing that no scire facias to revive a judgment "shall be issued but within ten years from the date of the rendition of the judgment," and that the act should take effect one year from its date, was intended to have a retrospective operation.

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3. CIRCUIT COURTS OF APPEAL—JURISDICTION—CONSTITUTIONAL QUESTIONS.
Under Act March 3, 1891, §§ 5, 6, a circuit court of appeals has no jurisdiction of a case in which the question is whether a state statute is void because it contravenes the constitution of the United States.[1]

4. SAME.
If it is claimed that a law of a state is void because it contravenes the constitution of the United States, a circuit court of appeals has no jurisdiction of the case, although it may involve the consideration of many other questions.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

O. W. Watkins, for plaintiff in error.

Joseph M. Hill and James Brizzolara, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. On April 6, 1897, George W. Wrightman, the plaintiff in error, sued out a writ of scire facias to revive a judgment which he had recovered in the court below on May 13, 1880, against Boone county, in the state of Arkansas, the defendant in error. The county answered, among other things, that the scire facias was not issued until after more than 10 years had elapsed from the rendition of the judgment, that the judgment had never been revived, that more than 10 years had elapsed since the last payment was made thereon, and that the action was barred by the statute of limitations. Upon a demurrer, and at the close of the trial, the court below sustained this defense, and rendered a judgment against the plaintiff. Its ruling is based upon this state of the law: On and prior to April 8, 1891, the owner of a judgment in the state of Arkansas had the right to a writ of scire facias to revive it at any time within 20 years after its rendition. Brearly v. Peay, 23 Ark. 172, 174; Crane v. Crane, 51 Ark. 287, 294, 11 S. W. 1. On that day the legislature of the state of Arkansas passed, and the governor of that state approved, an act in these words:

"Section 1. That no scire facias to revive a judgment shall be issued but within ten years from the date of the rendition of the judgment; or if the judgment shall have been aforetime revived then within ten years from the order of revivor.

"Sec. 2. This act shall take effect and be in force from and after one year from the date of its passage."

Acts Ark. 1891, p. 192 (Sand. & H. Dig. § 4208).

The court below held that this law was a bar to the prosecution of this action, and this ruling is challenged on the ground that, if this act was intended to have that effect, it was in violation of section 10 of article 1 of the constitution of the United States, that no state shall pass any law impairing the obligation of a contract. Of course, the question whether or not the act was intended to have a retrospective effect, whether or not it was intended to prevent the issue of writs of scire facias to revive judgments rendered before it was

[1] As to jurisdiction of the circuit courts of appeals, see note to Lau Ow Bew v. U. S., 1 C. C. A. 6.

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enacted, accompanies, and is presented with, the question of its constitutionality as it always is when a law is challenged under this clause of the constitution; but no other question of any importance is raised by the record before us. It is conceded that a construction which gives to a statute a retrospective effect should not be adopted unless it clearly and unequivocally appears that the legislature enacted it with the intention to cause that effect. End. Interp. St. § 271; Twenty Per Cent. Cases, 20 Wall. 179, 187; Shreve v. Cheesman, 32 U. S. App. 676, 689, 16 C. C. A. 413, 417, and 69 Fed. 785, 792; Bank v. Reithmann, 49 U. S. App. 144, 25 C. C. A. 101, and 79 Fed. 582; Jaedicke v. U. S., 29 C. C. A. 199, 85 Fed. 372, 375. An examination of the law in question, however, has left no doubt in our minds that the legislature of Arkansas intended that this act should affect judgments rendered before as well as those rendered after its passage. It provides that no scire facias shall issue to revive any judgment except within 10 years from its rendition. The legislature had the power to except from this broad prohibition judgments rendered before the enactment of the law, but it did not do so. The fact that it failed to make any exception raises a strong presumption that it intended to make none, and brings any exception that a court might be disposed to make into the forbidden category of judicial legislation. Madden v. Lancaster Co., 27 U. S. App. 528, 540, 12 C. C. A. 566, 573, and 65 Fed. 188, 195; Morgan v. City of Des Moines, 19 U. S. App. 593, 8 C. C. A. 569, and 60 Fed. 208; Paving Co. v. Ward, 55 U. S. App. 730, 741, 28 C. C. A. 667, and 85 Fed. 27, 35; McIver v. Ragan, 2 Wheat. 25, 29; Bank v. Dalton, 9 How. 522, 528; Vance v. Vance, 108 U. S. 514, 521, 2 Sup. Ct. 854. The second section of the act provides that it shall not take effect until one year after its passage. The plain purpose of this provision was to give the holders of judgments rendered 10 years or more before the passage of the act a reasonable time within which to revive their judgments before the law took effect. A construction that the act has no application to judgments rendered before its enactment would render this provision nugatory, and would fly in the teeth of the maxim that "all the words of a law must have effect, rather than that part should perish by construction." City of St. Louis v. Lane, 110 Mo. 254, 258, 19 S. W. 533; Knox Co. v. Morton, 32 U. S. App. 513, 518, 15 C. C. A. 671, 675, and 68 Fed. 787, 790; Paving Co. v. Ward, 55 U. S. App. 730, 741, 28 C. C. A. 667, and 85 Fed. 27, 35. The result is that the real question in the case is whether or not this law of the state of Arkansas is void because it is in contravention of the constitution of the United States. But section 5 of the act of March 3, 1891 (26 Stat. 828, c. 517), declares that appeals may be taken to the supreme court "(6) in any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States." Section 6 provides that in cases other than those provided for in section 5 the circuit courts of appeals may exercise appellate jurisdiction unless otherwise provided by law. This is not a case other than those provided for in section 5, and consequently this court has no jurisdiction of it. A careful examination of these sections of the act of congress in Hastings v. Ames, 32 U. S. App.

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485, 15 C. C. A. 628, and 68 Fed. 726, and in Pauley Jail Bldg. & Mfg. Co. v. Crawford Co., 28 C. C. A. 579, 84 Fed. 942, led us to the conclusion that, if it is claimed that a law of a state is void because it contravenes the constitution of the United States a circuit court of appeals has no jurisdiction of the case, although it may involve the consideration of many other questions. Upon the authority of these cases the writ of error in this case is dismissed for want of jurisdiction.

(88 Fed. 437.)

LEZINSKY v. METROPOLITAN ST. RY. CO.

(Circuit Court of Appeals, Second Circuit. June 24, 1898.)

No. 112.

1. STREET RAILWAYS—LIABILITY FOR TORT—UNAUTHORIZED ACTS OF EMPLOYES.
   In the absence of testimony showing authority from the company, the act of a street-railway conductor in causing the arrest of a former passenger immediately after ejecting him from the car for refusing to pay fare is outside the course of his employment, so that no action will lie against the company for malicious prosecution and false imprisonment.
2. SAME—RATIFICATION OF UNAUTHORIZED ACT.
   The action of a clerk in the claims department of a street-railway company, in endeavoring to convince a magistrate that a conductor was right in causing the arrest of a passenger after ejecting him from the car for refusal to pay fare, is not a ratification of the conductor's unauthorized action, where the clerk was merely directed by his superior to go to the police court, "and see what the matter was."

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action at law by Eugene Lezinsky against the Metropolitan Street-Railway Company for malicious prosecution and false imprisonment. In the circuit court a verdict was directed for defendant, and judgment entered accordingly, to review which the plaintiff sued out this writ of error.

Samuel S. Slater, for plaintiff in error.

Charles F. Brown, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is a writ of error to review a judgment in the circuit court for the Southern district of New York for the defendant, upon a verdict which was directed by the court upon the defendant's motion at the close of the plaintiff's case. The action was against the Metropolitan Street-Railway Company for malicious prosecution and for false imprisonment. The facts were as follows: The plaintiff, on April 3, 1896, at 12:30 p. m., entered at Spring street, in New York City, a car of the defendant, which was going uptown, and paid his fare. The car stopped, on account of a blockade, before it reached Houston street, when the conductor told the passengers that, if they were in haste, they had

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better walk to Houston street, where cars were being switched back, and take an uptown car, that he had no transfers, but that "it would be all right" if the passengers would explain to the inspector who was in charge of switching the cars. The plaintiff walked to Houston street, but a car had just left. The inspector told him to explain to the conductor of the next northward car the circumstances in regard to the payment of fare, and that a new payment would not be required. The plaintiff, with other passengers from the original car, boarded a car at Bleecker street, a block above Houston street; but its conductor demanded fare from all the passengers, would not recognize the previous payment, stopped the car at Ninth street, and ordered the passengers to pay the fare or to leave the car. The plaintiff refused to obey either direction, was ejected, and thereupon the conductor charged him with disorderly conduct, and requested a policeman to arrest him. He was put under arrest, and made a countercharge against the conductor, who was also arrested, and both were taken to the station house, detained 2½ hours, when the plaintiff was tried and discharged. Upon the way to the station house, the party met the conductor of the first car, who explained the facts to the second conductor, but he persisted in making the charge. At the station house, one Isaacson, a clerk in the defendant's claim department, who was sent there by some one of the defendant's officers to find out what the matter was, endeavored to persuade the plaintiff to withdraw his charge, saying that the conductor would also withdraw; but the plaintiff refused, and the case was heard, Isaacson arguing before the magistrate in support of the charge against the plaintiff.

The complaint was not brought to recover damages for the defendant's unlawful ejection of the plaintiff from the car, but to recover for a malicious prosecution and false imprisonment by the defendant's agent, after the plaintiff left the car. The defendant's liability depends upon the answer to the questions: First. Was the conductor acting in the course of his employment and within the scope of his authority, express or implied, in causing the arrest of the plaintiff, after he left the car, for his prior disobedience? And, secondly, if the conductor acted without authority, was there any testimony from which a jury could properly infer a ratification by the defendant of the conductor's act in causing the arrest?

The defendant is a common carrier, and it was its duty, upon the payment of fare, to exercise due care in the safe carriage of the defendant to the point upon the line of the road where he wished to go; and for his improper removal from the car it would have been liable in damages, because the carrier's obligation to transport safely "includes the duty of protecting the passenger from any injury cause by the act of any subordinate or third person engaged in any part of the service required by the act of transportation." Steamship Co. v. Kane (decided at the present term of this court) 88 Fed. 197. The subsequent act of the conductor in causing the arrest of the passenger was apparently outside of the course of his employment, outside of his service as a conductor, and was his

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act as an individual. It cannot be inferred, in the absence of testimony, that it is in the course of the employment of a conductor of a street cable car to cause the immediate arrest of a former passenger for his conduct in refusing to pay fare or to leave the car, and thus to take the risk of being compelled to leave his car in the street temporarily unprovided with a conductor. A criminal charge, under the circumstances of this case, was baseless (Lynch v. Railway Co., 90 N. Y. 77); and while it is established that "a corporation is liable civiliter for torts committed by its servants or agents precisely as a natural person, and that it is liable as a natural person for the acts of its agents done by its authority, express or implied," though there be no written appointment or authority (Railway v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286; State v. Morris & E. R. Co., 23 N. J. Law, 369; Rounds v. Railroad Co., 64 N. Y. 129; Mott v. Ice Co., 73 N. Y. 543), yet there should be some testimony or some circumstance to show that authority had been conferred for such a manifest apparent departure from the line of the business of a conductor of a street electric car.

It was sought to show ratification of the act by the attendance and conduct of one Isaacson at the hearing before the magistrate, and by the scope of Isaacson's employment. He was a clerk in the defendant's claim department, which had charge of the preparation of accident cases for trial, and was sent by his superior officers to go to the police court, "and see what the matter was." Inasmuch as a conductor had left his car, and been taken to the station house in charge of an officer, the direction was a very natural one to give. Isaacson went, and after ineffectually trying to induce the plaintiff to abandon his charge, and have a dismissal of both cases, he endeavored to show the magistrate that the conductor was in the right, and, in so doing, imitated the conductor in departing from his employment, without authority and with intrusive meddlesomeness. There would have been no propriety in submitting to the jury the question of ratification, based upon Isaacson's act or authority or course of business. The judgment of the circuit court is affirmed, with costs.

(88 Fed. 440.)

ÆTNA LIFE INS. CO. v. SMITH.

(Circuit Court of Appeals, Eighth Circuit. June 27, 1898.)

No. 1,036.

1. LIFE INSURANCE—DELAY IN PAYING PREMIUMS—PREMIUM RECEIPTS.
On the back of a premium receipt was printed, among other things, the following: "Provided satisfactory evidence and guaranty is furnished that the person whose life was insured is in good health and acceptable for new insurance, which guaranty shall be binding upon the insured and beneficiaries under said policy, the agent will receive a premium, and the insurance will be revived by the delivery of this receipt within 60 days from the time said premium became due." *Held*, that (applying the rule that contracts written on forms prepared by the insurer will, when ambiguous, be construed most favorably to the insured) the above provision was a mere direction by the company to its agents, so that the mere acceptance

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of such a receipt on the payment of an overdue premium would not imply a guaranty of good health on the part of the insured.

2. SAME—VIOLATION OF RULES BY AGENTS — KNOWLEDGE OF THE COMPANY'S OFFICERS.

Where, in violation of the rules of the company, it is the practice of its agents to accept overdue premiums without requiring a guaranty that the insured is in good health, and this course of business is shown to be such that a reasonably prudent man, acting in the capacity of an executive officer, ought to have known of it, this is sufficient to warrant a finding that the executive officer of the company did in fact have knowledge of the practice.

3. SAME—AUTHORITY OF AGENTS—ACQUIESCENCE BY COMPANY.

By knowingly permitting its agents to accept for a considerable period overdue premiums without taking health certificates, the company grants them authority so to do, and cannot avoid the effect thereof by showing that its printed instructions did not authorize the practice.

In Error to the Circuit Court of the United States for the District of Minnesota.

This action was upon two life insurance policies, both dated February 16, 1893,—one for the sum of $20,000, and the other for $5,000,—insuring the life of Cassius C. Merritt, who subsequently died on April 27, 1894, at Duluth, Minn. The suit was brought by Hanson E. Smith, the defendant in error, as administrator with the will annexed of said deceased. In his complaint he alleged, among other things, that the deceased paid all the premiums that accrued on both of said policies prior to his death; that the last premiums thereon, which fell due February 16, 1894, were not paid until March 6, 1894, at which time the defendant company accepted said premiums and gave receipts therefor as provided in its policies. The defenses interposed by the defendant company were as follows:

That the premiums on said policies which became due on the 16th day of February, 1894, were not paid, and that said policies, by the terms thereof, became void and inoperative. That on March 6, 1894, one Merrill M. Clark, a friend and agent of Cassius C. Merritt, volunteered to pay to the defendant's agent at Duluth, Minn., the amount of the premiums due on the aforesaid policies on February 16, 1894. That said agent of the defendant company consented to receive the same, and to deliver receipts therefor, upon the express condition that the premiums should not be deemed paid, nor the receipts be deemed delivered, unless said Merritt was at the time in good health; that, if he was not then in good health, the said premium money should be returned and the receipts surrendered upon demand. That at the time in question, March 6, 1894, neither the defendant company nor its agent had any knowledge of the state of health of said Merritt, but that in fact, as the said Merritt and said Clark well knew, the said Merritt was not in good health, but was sick and diseased, and already suffering from the complaint of which he subsequently died. That within a few days thereafter, and during the month of March, 1894, it came to the knowledge of the defendant's agent that said Merritt was not in good health when the aforesaid premiums were paid. That said agent thereupon demanded the return of said receipts from said Clark upon the ground that the insured at the time of the delivery thereof was not in good health, and offered to, and did in fact, return the premium money. And that said receipts were thereupon surrendered by said Clark to the defendant's agent, in pursuance of the condition upon which they had been originally delivered. The defendant company further alleged: That it was expressly stipulated in the written application for the aforesaid policies that no person other than the executive officers of the defendant company could make any agreement binding upon said company, and that in and by one of the conditions of said policies it was stipulated that no other person, save one of the executive officers of the company, could alter or waive any of the conditions of said policies, or make an agreement binding upon the defendant company. That the premium receipts referred to in the complaint, which were delivered on March 6, 1894, were in the following form:

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"Hartford, Conn., February 16, 1894.

"Received the annual premium on policy No. 43,726, on the life of C. C. Merritt, continuing said policy in force for twelve months from date, ending at five o'clock p. m. on the 16 day of February, 1895. Premium, $557.40.

"Not binding without date of payment and signature of agent here.

"Paid this 6th day of February, 1894. * * *

"J. L. English, Secretary,
"St. Paul.

"G. H. MacClelland, Agent at
"Duluth, Minn."

—That upon the back of said receipt was plainly printed the following, to wit:

"Take Notice. No grace is allowed for the payment of premiums. Policies cease and determine in accordance with their provisions if the premiums are not paid on or before the date stipulated therein for such payment. Any receipt given therefor must be signed by the president or secretary of the company, and the only evidence to the assured of the authority of any agent to receive a premium is the possession of such a receipt. This receipt will not bind the company unless the date when the premium is paid is stated hereon by the the agent over his signature. Provided satisfactory evidence and guaranty is furnished that the person whose life was insured is in good health and acceptable for new insurance, which guaranty shall be binding upon the insured and beneficiaries under said policy, the agent may receive the premium, and the insurance will be revived by the delivery of this receipt within sixty days from the time when said premium became due. After the expiration of said sixty days, the delivery of this receipt on any terms will not revive the insurance, nor bind the company. All policies and agreements made by this company are signed by its president, vice president, secretary or assistant secretary. No other person can alter or waive any of the conditions of its policies, or issue permits of any kind, or make agreements binding upon the company."

It was further alleged that the foregoing provisions contained in said application, policies, and receipts were well known to Cassius C. Merritt, the deceased, and to persons connected on his behalf with the payment of said premiums, including the said Merrill M. Clark; that, as said persons well knew, the said agent had no authority to receive the premiums which were paid to him, or to surrender the receipts, without receiving the guaranty referred to on the back of said receipt, that the insured was then in good health and acceptable for new insurance; and that the said local agent of the defendant company, as the said Merritt and all persons representing him well knew, was not authorized or empowered to waive any of the conditions of said application for insurance, or of said policies of insurance, or of said receipts, or to surrender the said receipts, or to receive the said premium money, under other circumstances than therein prescribed.

For a reply to these averments of the answer the plaintiff below alleged, in substance, that it was not true, as therein stated, that said Merrill M. Clark on March 6, 1894, volunteered to pay the overdue premiums on said policies, acting in that behalf as the friend and agent of said Merritt; that it was not true that the premiums so paid were accepted on the express condition alleged in the answer, that, if said Merritt was not then in good health, the money paid as premiums should be returned by the defendant company, and the premium receipts given therefor should be surrendered by the insured; that in truth and in fact the premiums due on February 16, 1894, were paid and accepted, and renewal receipts were given therefor, on March 6, 1894, under and subject to no conditions whatsoever, and the policies were thereby renewed for the succeeding year; that afterwards, on March 11, 1894, the agent of the defendant company at Duluth falsely represented to said Clark that the company had refused to accept the money theretofore paid as premiums on said policies, and requested a return of the renewal receipts theretofore delivered, and that said Clark having access to said receipts as security for money which he had loaned to the insured to pay the premiums, and being deceived and misled by said false statement, was thereby induced to surrender the receipts to the defendant company's agent, and to accept a check

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for the amount of the premiums theretofore paid, doing so wholly without the knowledge, consent, or sanction of the insured; that the statement so made to said Clark by the defendant's agent as a means of obtaining the renewal receipts was wholly false, the fact being that the defendant company had before that time accepted and treated as its own the money that was paid as premiums on March 6, 1894, and the fact being that the premium receipts which were given therefor, a copy of which is correctly set forth above in the defendant's answer, had been in the possession of the defendant's agent at Duluth, awaiting payment, for more than 30 days before they were delivered to the insured.

On these issues the case was tried before a jury, which returned a verdict in favor of the plaintiff. The case comes to this court on a writ of error which was sued out by the defendant company.

W. W. Billson (C. A. Congdon and D. A. Dickinson, on brief), for plaintiff in error.

A. A. Harris and W. O. Pealer (Henry E. Harris and Bert Fessler, on brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The principal issue in this case which was raised by the pleadings, and concerning which there was most controversy at the trial, was whether the premiums on the two policies in suit that were due on February 16, 1894, and were not paid until March 6, 1894, were paid at the latter date in pursuance of an express agreement, between the agent of the company and those who at the time were acting for the insured, that, if it transpired that the latter was not at that time in good health, the premium money so paid should be refunded to the insured, and the premium or renewal receipts given therefor surrendered to the company. The defendant contended that the premiums were paid in pursuance of such an agreement, the insured being at the time absent from home, and his physical condition being unknown to its agent, while the plaintiff below just as strenuously insisted that the money was accepted by the defendant's agent at Duluth unconditionally, and that such acceptance operated to renew the policies until February 16, 1895, long after the insured died. This issue was fairly submitted to the jury, under appropriate instructions, of which no complaint is made; the finding was against the defendant; and it must be taken for granted by this court that there was no express agreement made on March 6, 1894, entitling the defendant company to refund the premiums on that day paid, and to demand the surrender or cancellation of its renewal receipts, if it subsequently ascertained that the insured was not in good health when the premiums were paid. Failing to obtain a favorable verdict on this issue of fact, the defendant now contends that the mere acceptance of the renewal receipts, with the notice indorsed on the back thereof, constituted a guaranty by the insured that he was then in good health, and that, if such was not the case, the policies were not renewed, and that there can be no recovery thereon. The case is likened by counsel to those in which persons accepting warehouse or express receipts, having statements indorsed thereon showing upon what conditions the

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property is received, or the terms upon which it will be transported, have been held bound thereby, even without an express oral assent to such terms or conditions. Watkins v. Rymill (1883) 10 Q. B. Div. 178; Duntley v. Railroad (N. H.) 20 Atl. 327; Oppenheimer v. Express Co., 69 Ill. 62, 69; Hart v. Railroad Co., 112 U. S. 342, 5 Sup. Ct. 151. It is questionable, to say the least, whether this latter defense, namely, that the insured guarantied that he was in good health on March 6, 1894, was pleaded in the defendant's answer, or intended to be pleaded. The portion of the answer which is relied upon as containing in substance such a plea would seem to have been framed for a far different purpose, namely, for the purpose of showing that the defendant's agent had no power to waive a regulation requiring him to cause policy holders whose premiums were overdue to sign health certificates, as a condition of reinstatement,—that being the usual manner in which a policy holder's state of health was made known to the company's agents,—and that the insured was advised of such want of authority on the part of its agent to dispense with the signing of a health certificate. But, waiving the defendant's failure to plead specifically that the insured guarantied that he was in good health, and that the guaranty was broken, we think that the defense which is attempted is untenable for other reasons. To establish the existence of a guaranty of good health, reliance is placed on a clause printed on the back of the renewal receipt, quoted above in the statement, which clause, when transposed so as to make its meaning more apparent, reads as follows:

"The agent may receive the premium, and the insurance will be revived by the delivery of this receipt within sixty days from the time when said premium became due: provided satisfactory evidence and guaranty is furnished that the person whose life was insured is in good health, and acceptable for new insurance, which guaranty shall be binding upon the insured and beneficiaries under said policy."

This clause on the back of the receipt does not say to the insured, as it should have done if the mere delivery and acceptance thereof were intended to bind him by a contract of guaranty, that the acceptance of the receipt by the insured should be construed as a guaranty that he was at the time in good health, and that the policy should not stand renewed unless such was the fact; but it contains, rather, a direction to the agent of the company as to the mode and manner of discharging his duty. It required him, when a premium was overdue, to obtain satisfactory evidence and a guaranty that the insured was in good health and acceptable for insurance, before accepting the premium and delivering the receipt. Being, therefore, in the nature of a direction by the insurer to its agent, the law, we think, will not imply a guaranty of good health on the part of the insured from the mere acceptance of the receipt. Even if the language contained in the notice on the back of the receipts was sufficient to give some color to the claim that the mere acceptance thereof by the insured was tantamount to a guaranty of good health, yet inasmuch as the receipts in question, like the policies in suit, were written on forms which were prepared by the defendant company or its legal advisers for use in its daily business, we should esteem it our duty, the intent of the parties

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not being clear, to resolve any doubt against the company, and to do so in obedience to the well-established rule, that, where contracts are written on forms which are prepared by the insurer, they are to be interpreted in all cases of doubt or uncertainty in a manner which is most favorable to the insured. National Bank v. Insurance Co., 95 U. S. 673, 679; Thompson v. Insurance Co., 136 U. S. 287, 297, 10 Sup. Ct. 1019; Insurance Co. v. McConkey, 127 U. S. 661, 666, 8 Sup. Ct. 1360; Indemnity Co. v. Dorgan, 16 U. S. App. 290, 309, 7 C. C. A. 581, 58 Fed. 945; Insurance Co. v. Randolph, 24 C. C. A. 305, 78 Fed. 754, 761, 762.

On the trial in the circuit court the plaintiff below undertook to show by proper evidence that while the defendant's agents were required, by directions contained on the back of its renewal or premium receipts, to obtain from persons whose premiums were overdue "satisfactory evidence and a guaranty" that such persons were in good health, before accepting their overdue premiums, yet that, in the actual transaction of the company's business, its agents frequently accepted overdue premiums, and turned them over to the company, without requiring such a guaranty. In other words, the plaintiff undertook to prove that the company's agents in the state of Minnesota were vested with an authority, to be exercised in their discretion, to accept overdue premiums without a guaranty, and that they exercised that power, doing so in the case at bar. The evidence in support of that contention, stated briefly and in substance, consisted of proof that guaranties of good health, in the case of overdue premiums, were taken on a form prescribed by the company, termed a "health certificate," which was signed by or in behalf of the insured, and of reports of premium collections made by agents to the home office, which reports showed that, in a good many instances, premiums had been collected after maturity without exacting such health certificates. It was conceded on the oral argument, as we understand, that the proof in question was adequate to support the finding that the agents of the defendant company were clothed with the discretionary power above described, and no doubt can well be entertained on that point. It is insisted, however, that the trial court erred in its charge on this issue, in that it instructed the jury, in one part of its charge, as follows: "The plaintiff is not required to show that the executive officers of the defendant actually knew personally of the practice of its agents in receiving renewal premiums, and delivering renewal receipts therefor, after the same were past due, without requiring evidence and guaranty that the insured persons were then in good health,"—and that it thereby permitted agents of the company to acquire an enlarged authority, different from that conferred by the company's renewal receipts, by a mere practice or course of business which was not known to the company's executive officers. This criticism of the instruction is not tenable, we think, because the trial court immediately explained the meaning of that part of the charge which is last quoted; saying to the jury, in substance, that it meant merely this: That the plaintiff was not required to prove by direct evidence that the executive officers had knowledge of the practice of the company's agents, and that, if the plaintiff had shown that the course of

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business was such that a reasonably prudent man ought to have known what the practice or course of business on the part of the company's agents was, such evidence was sufficient to warrant a finding that the executive officers did in fact have knowledge of the practice. As thus modified and explained, we think that the instruction given was substantially right. The jury might well be left to infer that the executive officers of the company were acquainted with the practice of its agents, if, in view of the course of dealing and method of transacting business, in the exercise of a reasonable supervision over the company's affairs, they would have known it.

Complaint is further made by the defendant company that the trial court erred in excluding from the jury a pamphlet entitled "Instructions to Agents," which purported to have been compiled by it in the year 1891. This pamphlet was attached to a deposition which was read in evidence by the defendant, and was offered, as we shall assume, for the purpose of showing that the printed instructions issued by the defendant to its agents did not permit them to accept overdue premiums without exacting a written certificate or guaranty of good health, signed by the insured. It may be conceded that the pamphlet had a tendency to prove that such were the company's printed instructions, but there are several reasons, we think, why the exclusion of this pamphlet cannot be regarded as a material error. In the first place, the pamphlet contained the same directions to agents, requiring them to obtain a written guaranty of good health in case of the payment of an overdue premium, that were printed on the back of the renewal receipts heretofore mentioned, which were already in evidence. The proof therefore was merely cumulative in its character. In the second place, two witnesses testified for the defendant, and without objection, to substantially all the facts which the printed instructions tended to establish. But a more conclusive reason why the exclusion of the pamphlet cannot be regarded as a material error is found in the fact that for the purpose of establishing that the agents of the company had power to accept overdue premiums, in their discretion, without exacting a guaranty of good health, the plaintiff relied exclusively upon proof of their actual practice in that regard, as shown by their reports to the home office, and the pamphlet had no tendency to disprove the practice in question. The defendant could not avoid the necessary effect of knowingly permitting its agents, for a considerable period, to accept overdue premiums without taking health certificates, by showing that its printed instructions did not authorize such a practice. Its agents could acquire the power in question by exercising it for a considerable period with the knowledge of the executive officers of the company, as well as by printed or written instructions.

There are some other alleged errors enumerated in the lengthy written argument with which we have been favored by counsel for the defendant company, but the questions of law which they present are subordinate to those heretofore discussed, and are in effect decided by what has already been said. We find no error in the record which would warrant a reversal, and the judgment below is therefore affirmed.

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(88 Fed. 446.)

DOOLEY v. PEASE.

(Circuit Court of Appeals, Seventh Circuit. July 26, 1898.)

No. 472.

1. APPEAL AND ERROR—REVIEW—SPECIAL FINDINGS OF FACT.
   Whether a special finding of fact made by the circuit court is in accordance with the preponderance of the evidence, cannot be considered on a writ of error.
2. SAME—MIXED QUESTIONS OF LAW AND FACT.
   The decision of a circuit court on a mixed question of law and fact cannot be reviewed on a writ of error.
3. SALE—VALIDITY—CHANGE OF POSSESSION.
   A sale of personalty, not followed by open and visible or notorious change of possession or ownership, is void, under the law of Illinois, as against creditors of the seller.

In Error to the Circuit court of the United States for the Northern Division of the Northern District of Illinois.

Counsel for plaintiff in error submitted on brief.

Lockwood Honore, for defendant in error.

Before WOODS and SHOWALTER, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge. This was an action of trespass by the plaintiff in error, Michael F. Dooley, as receiver of the First National Bank of Willimantic, Conn., against the defendant in error, James Pease, charging him with having forcibly seized and carried away a stock of goods in store at Nos. 213 and 215 Fifth avenue, in the city of Chicago. The defendant pleaded the general issue, under which it was agreed that all defenses, of whatever nature, might be proved as if specially pleaded; and by stipulation in writing a jury was waived, and the court made a special finding of facts, upon which it pronounced the defendant not guilty, and gave judgment accordingly. Error is assigned to the effect that the judgment is not supported by the facts found.

The special finding is made of great length by the statement of many facts which, though relevant and important, are evidentiary only of the ultimate facts found. For the present purpose a short statement will be sufficient: At the time of the alleged trespass (May 20, 1895) the defendant, Pease, was the sheriff of Cook county, Ill. He seized the goods by virtue of a writ of attachment for the sum of $14,786.53, issued out of the circuit court of Cook county against the Natchaug Silk Company, a corporation of Connecticut; and four days later he levied on the goods another attachment out of the same court, against the same company, for a sum exceeding $8,000. The validity of the writs under which the seizure was made is not questioned. The dispute is over the ownership of the goods at the time of the seizure. They had belonged to the attachment defendant, the Natchaug Silk Company, prior to and on April 25, 1895; and the point of dispute is whether the

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instrument of sale that day executed in the name of the company by its president was valid and effective to transfer title to the plaintiff in error, as receiver of the First National Bank of Willimantic, Conn. The validity of that instrument is denied on several grounds. The first is that the president of the company was without authority to make the sale. Upon this point the court found, as a fact, and also as a matter of legal conclusion, that the president of the company had no authority to make the sale, and seems to have placed its decision of the case mainly upon that ground. It is insisted that certain facts specifically stated in the finding require the contrary conclusion. The facts chiefly relied on are that the president of the company had also been made its general manager; that, as president, he was empowered by a by-law of the corporation to "perform all duties especially required of him by the statute laws of this state [Connecticut], but his charge of the executive business of the company shall be subject to the control of the directors"; and that by an amendment of the by-laws a general manager was to be chosen annually, who should "have entire charge of the business and affairs of the said company, subject to the order and approval of the board of directors." On the authority of Dooley v. Hadden, 38 U. S. App. 651, 20 C. C. A. 494, and 74 Fed. 729, Scudder v. Anderson, 54 Mich. 122, 19 N. W. 775, and especially of Lewis v. Manufacturing Co., 56 Conn. 25, 12 Atl. 637, it is insisted that the power of general management so given to the president of the company included the power to pay the debts of the company by the application of any portion or all of its personal property. Manifestly, however, such a question is not one of law, purely, but also of fact, dependent upon the circumstances of each case. The cases mentioned, it is to be assumed, were decided correctly upon the proofs adduced. In this case the court found the fact to be that the sale was unauthorized, and had never been ratified, by the company; and there are many circumstances and evidentiary facts set forth in the special finding which tend to support the conclusion,—the chief being that the debtor company was at the time absolutely insolvent and on the verge of suspending business, and that, without the sanction of any other officer or member of the company, the president, knowing the situation, made this sale, and others, covering the entire property of the company, to particular creditors, for the purpose of preferring them over other creditors. Whether the finding of the court upon this question was according to the preponderance of the evidence is a question which this court cannot consider. Besides the provision in section 1011 of the Revised Statutes, that "there shall be no reversal * * * upon a writ of error * * * for any error of fact," it is well settled that under sections 649 and 700 the right of review, when judgment has been rendered upon a special finding, extends only to "the rulings of the court in the progress of the trial," and to "the determination of the sufficiency of the facts proved to support the judgment." The cases on the subject in the supreme court and in the circuit courts of appeals are numerous. See Fourth Nat. Bank of St. Louis v. City of Belleville, 53 U. S. App. 28, 27 C. C. A. 674, and 83 Fed. 675; Smiley v. Barker, 55 U. S.

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App. 125, 28 C. C. A. 9, and 83 Fed. 684; Stanley v. Supervisors, 121 U. S. 535, 7 Sup. Ct. 1234; Hathaway v. Bank, 134 U. S. 494, 10 Sup. Ct. 608; St. Louis v. Rutz, 138 U. S. 226, 11 Sup. Ct. 337. In Runkle v. Burnham, 153 U. S. 216, 14 Sup. Ct. 837, it is said that "findings of fact made by the court below are binding here, if there be any evidence to support them." It necessarily follows, and has often been decided, that a mixed question of law and fact cannot be reviewed on a writ of error. Dennistown v. Stewart, 18 How. 565; Jewell v. Knight, 123 U. S. 426, 8 Sup. Ct. 193; Smith v. Craft, 123 U. S. 436, 8 Sup. Ct. 196; Burnham v. Railway Co., 46 U. S. App. 670, 23 C. C. A. 677, and 78 Fed. 101. When the trial is by jury, the law part of such mixed questions may be saved for review on exceptions to the rulings of the court. Norris v. Jackson, 9 Wall. 125. But, if a party sees fit to waive a jury in a case involving a question of that kind, he puts it beyond his power to challenge the court's finding, unless he may chance to be able to do so upon an exception to a ruling during the progress of the trial. For instance, if the issue be negligence, which rarely is resolved into a pure question of law, a special finding of the ultimate fact either way cannot be overthrown by force of merely evidentiary facts stated in the finding, however strong; and so, here, the finding that the sale was unauthorized, and had not been ratified, cannot be impeached on the strength of the circumstances stated tending to show the contrary. The sale, made as it was without authority, did not pass title, and the goods were therefore subject to seizure by virtue of the writs of attachment.

Another ground on which the sale was clearly invalid is the finding of the court that the sale was not followed by an open or visible or notorious change of possession or ownership unless, as matter of law, the facts stated in the finding constituted sufficient information to the public of the change. The facts so stated were evidentiary only, and, instead of being conclusive of publicity, tended rather to show intentional concealment. They were certainly sufficient, even if we were required to look into the evidence, to support the finding of the ultimate fact. The sale was therefore void, under the law of Illinois, which "will not permit the owner of personal property to sell it, and still continue in the possession of it." Green v. Van Buskirk, 7 Wall. 139; Hervey v. Locomotive Works, 93 U. S. 664; Martin v. Duncan, 156 Ill. 274, 41 N. E. 43; Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. 51; Pullman's Palace-Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876. It is urged that while the federal courts follow the rule of the state, that a transfer of personal property, where the vendor is permitted to remain in possession, is fraudulent and void as to creditors, the federal courts are not bound to give heed to the opinions of the supreme court of Illinois upon matters of fact, and that what will constitute a sufficient change of possession must necessarily be determined upon the facts of each case. That may be conceded; but the court here having determined the fact against the appellant, whether according to the weight of the evidence or not, the finding, by the authorities already cited, cannot be reviewed.

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There are other propositions embraced in the finding, which, it is urged, are sufficient to support the judgment rendered, but they need not be considered. The judgment is affirmed.

(88 Fed. 449.)

CITY OF SOUTH ST. PAUL v. LAMPRECHT BROS. CO.

(Circuit Court of Appeals, Eighth Circuit. June 27, 1898.)

No. 1,043.

1. VALIDITY OF STATUTES—SUBJECTS EXPRESSED IN TITLE.
   A constitutional provision that no law shall embrace more than one subject, which shall be expressed in its title, does not prevent the legislature from inserting in an act any provision which is germane to the general subject to which the act relates. It is only intended to prevent surreptitious legislation, and the union in the same act of incongruous matters, having no natural relation to each other, or to the general subject with which the act deals.
2. SAME—ACT AMENDING MUNICIPAL CHARTER.
   An act revising and amending the charter of a city located on the bank of a large river is not obnoxious to a constitutional provision limiting legislative measures to one subject, merely because it authorizes the municipality, among other things, to issue bonds to defray the cost of a railroad and wagon bridge across the river.
3. MUNICIPAL BONDS—RECITALS—BONA FIDE PURCHASERS.
   The issuance of bonds containing the representation that they are "authorized by" a certain act of the legislature estops the municipality from tendering proof, as against a bona fide purchaser, that they were not so authorized, and that certain requisite preliminary steps were not in fact taken.
4. SAME—AUTHORITY TO CONSTRUCT BRIDGE.
   A charter provision authorizing a city situated on one bank of a river to issue bonds to aid "in defraying the cost and expense of constructing a combination railroad and wagon bridge" is sufficient authority for issuing bonds to aid in building such a bridge across the river in question, though part of the bridge will necessarily be outside the corporate limits.
5. SAME—BONA FIDE PURCHASERS.
   A purchaser in the open market of municipal bonds purporting to have been issued to aid in constructing a bridge across a navigable river is entitled to presume that the secretary of war had approved the proposed location of the bridge.
6. SAME—MATURITY OF BONDS.
   Under a charter provision authorizing the issuance of bonds "payable at such times not to exceed 30 years" as may be determined, the bonds are not void when they run 30 years from the time they first begin to bear interest, though this is more than 30 years from the time they were executed.

In Error to the Circuit Court of the United States for the District of Minnesota.

Albert Schaller, for plaintiff in error.
O. M. Metcalf and Henry C. James, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

THAYER, Circuit Judge. This was an action on coupons detached from 74 municipal bonds which were issued by the city of South

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St. Paul in the year 1891, to aid in defraying the cost of constructing a railroad and wagon bridge across the Mississippi river, on which said city is located. The case was tried in the circuit court on a written stipulation waiving a jury, and the trial judge made a special finding of facts. The questions to be considered, therefore, are those which were raised during the trial by exceptions to the admission and exclusion of evidence, or such as are comprehended by the general inquiry whether the facts found by the trial judge are sufficient to sustain the judgment. Searcy Co. v. Thompson, 27 U. S. App. 715, 13 C. C. A. 349, and 66 Fed. 92. We will consider them mainly in the order in which they have been discussed by counsel.

The first proposition to be noticed is the contention of the defendant city that the bonds from which the coupons were detached were issued without authority of law, and are therefore void. On April 23, 1891, the legislature of the state of Minnesota passed an act entitled "An act to amend 'An act to incorporate the city of South St. Paul,' as amended by the several acts amendatory thereof, and to authorize said city to issue bonds for various purposes." Sp. Laws Minn. 1891, p. 674, c. 58. This act altered various provisions of the law under and by virtue of which the city of South St. Paul had been incorporated, and was in the nature of a revision of the existing city charter. All the provisions of the act related to the powers which the city might exercise, or to the mode and manner of their execution. The eighteenth section of said act was as follows:

"The common council is hereby authorized to issue the bonds of said city for the purpose of aiding in defraying the cost and expense of constructing a combination railroad and wagon bridge, or both, as may be determined hereafter, to an amount not to exceed seventy-five thousand dollars ($75,000.00), to be issued in such denominations and payable at such times not to exceed thirty (30) years, and at such rate of interest not to exceed six (6) per cent. per annum, and at such place as may be determined."

It was then provided, in substance, that, before the bonds should be issued, the common council, by a three-fourths vote of all its members, should agree upon a "proposal or plan" for constructing the bridge which should embody an estimate of its total cost; that the proposition to issue bonds should be submitted to a popular vote of the electors of the city, at a special election, and receive the approval of a majority of the electors voting at such election before the bonds were issued; and that such election should be called within 60 days after the adoption by the council of the proposal or plan for building the bridge.

It is claimed by counsel for the city, as we understand, that, because the aforesaid act contained a provision conferring power to issue bonds for the construction of a bridge, it embraced more than one subject, and was therefore obnoxious to section 27, art. 4, of the constitution of the state of Minnesota, which declares that "no law shall embrace more than one subject which shall be expressed in its title." This contention, we think, is based upon a misconception of the meaning and purpose of the constitutional provision in question. It was not adopted to prevent the legislature from inserting in an act any provision which is germane to the general subject to which the act relates, but to prevent surreptitious legislation, and the union in the

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same act of incongruous matters, which have no natural relation to each other, or to the general subject with which an act deals. City of Omaha v. Union Pac. Ry. Co., 36 U. S. App. 615, 623, 20 C. C. A. 219, and 73 Fed. 1013; Travelers' Ins. Co. v. Township of Oswego, 19 U. S. App. 321, 332, 7 C. C. A. 669, and 59 Fed. 58; Tabor v. Bank, 27 U. S. App. 111, 10 C. C. A. 429, and 62 Fed. 383; Johnson v. Harrison, 47 Minn. 575, 577, 50 N. W. 923; Montclair v. Ramsdell, 107 U. S. 147, 2 Sup. Ct. 391; Cooley, Const. Lim. (6th Ed.) pp. 169–172, and cases there cited.

This provision of the constitution ought not to receive a narrow or technical construction, which will embarrass legislation by making laws unnecessarily restrictive in their scope and operation; but, like all provisions of the organic law, it should be fairly and liberally interpreted and enforced, so that it will serve to prevent the abuses at which it was aimed, without placing unnecessary restraints upon legislative action. An act like the one now in hand, which revises and amends the charter of a city located on the bank of a large river, is certainly not obnoxious to a constitutional provision limiting legislative measures to one subject, merely because the act authorizes the municipality, among other things, to issue bonds for the purpose of defraying the cost of a railroad and wagon bridge across such river. A provision of that kind has a natural and an obvious relation to the general subject, to which the attention of the legislature was for the time being addressed, and for that reason such a provision must be pronounced germane to the general purpose of the act. We have no doubt that the act of April 23, 1891, would be pronounced valid by the courts of Minnesota. City of St. Paul v. Colter, 12 Minn. 41, 50 (Gil. 16); City of Winona v. School Dist. No. 82, 40 Minn. 13, 41 N. W. 539; Boyle v. Vanderhoof, 45 Minn. 31, 47 N. W. 396; Johnson v. Harrison, 47 Minn. 575, 50 N. W. 923; State v. La Vaque, 47 Minn. 106, 49 N. W. 525; Willis v. Mabon, 48 Minn. 140, 155, 50 N. W. 1110.

A variety of other questions are suggested in the brief of counsel for the city, and have been argued at some length, which, for the sake of brevity, may be disposed of collectively. It is contended, in substance, that the act of April 23, 1891, did not authorize an issue of bonds to build a bridge like the one involved in the case at bar, which was partly outside of the corporate limits of the city; that it did not warrant the issuance of bonds to build a bridge across a navigable stream unless the consent of the secretary of war to the proposed location of the bridge had been obtained; that the common council did not adopt a proposal or plan for building the bridge, within the fair intent and meaning of the act of April 23, 1891, before the bonds in controversy were issued; that the proposal or plan, such as it was, contained no estimate of the cost of the structure; that the original resolution of the council adopting such proposal or plan, if the same was adopted by the council, was never signed by the mayor of the city, as it should have been to become operative; that William Thuet, who signed the bonds as comptroller of the city, was not at the time a city officer; that no valid election was held to obtain authority from the electors to issue the bonds; and that the provisions of the charter of the city of South St. Paul relative to the signing and publi-

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cation of ordinances and resolutions were not followed in so far as the ordinances and resolutions relating to the issuance of the bonds in suit were concerned.

It is to be observed, however, that some of the assumptions of fact contained in the foregoing propositions are contrary to the special finding which was made by the trial judge. The trial judge found, among other things:

"That the common council of South St. Paul, by a vote of more than three-fourths of all its members, agreed to adopt, and did adopt, on or about May 7, 1891, a proposal or plan for building a combination railroad and wagon bridge across the Mississippi river, at or near South St. Paul, which proposal or plan stated the plan and specifications for constructing said bridge, together with an estimate of the total cost thereof, and that on the same date said common council of South St. Paul determined to submit to the qualified electors of said city the proposition of issuing the bonds described in the complaint, in aid of said bridge, and gave due notice to the qualified electors that an election would be held in the several election districts to determine the question whether the said bonds should be issued, and that an election was accordingly held on the 28th day of May, 1891, at which time a majority of the qualified electors voting at said election voted in favor of issuing said bonds; * * * that thereafter, on May 28, 1891, at a meeting duly held, the common council of the city of South St. Paul adopted a resolution of which Exhibit B (the same being a resolution authorizing the issuance of the bonds in suit) attached to the answer is a true copy, and that the same was duly signed by the mayor; * * * that William Thuet was on the 29th day of May, 1891, the city comptroller of the city of South St. Paul; * * * that the plaintiff purchased the coupons described in the complaint before maturity, * * * and in the open market, and is a bona fide holder thereof."

Inasmuch as the findings by the trial judge are not open to dispute in this court, but must be accepted as conclusive (Insurance Co. of North America v. International Trust Co., 36 U. S. App. 291, 302, 303, 17 C. C. A. 616, and 71 Fed. 88), it follows that several of the contentions above mentioned are without merit. But, if such was not the case, it is nevertheless true, we think, that the defendant city is estopped in this action from asserting the invalidity of the bonds on any of the grounds last above indicated, by the recital which the bonds contained, and by the finding of the trial court that the plaintiff purchased the coupons in suit before maturity in the open market, and is a bona fide holder thereof. The recital last referred to is as follows:

"This bond is one of a series of seventy-five bonds, issued to aid in building a bridge, and authorized by act of the legislature of the state of Minnesota, at a session thereof held in the year 1891, and in compliance with a resolution of the common council of the city of South St. Paul, at a regular meeting thereof, held May 28, 1891; and, to the payment of this bond and interest thereon, the faith and credit of the city of South St. Paul are irrevocably pledged."

The bonds were signed by the mayor of the city of South St. Paul. They were attested by the city clerk, countersigned by the city comptroller, and bore the imprint of the corporate seal. It was a part of the official duty of these officers to execute and deliver the bonds, and, before doing so, to ascertain and determine whether all of the antecedent conditions prescribed by the act under which they were issued, such as the adoption of a proposal or plan, the holding of a lawful election, and the passage of proper resolutions or ordinances,

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had been duly performed. Under these circumstances, the fact that bonds were issued containing a representation that they were "authorized by act of the legislature of the state of Minnesota at a session thereof held in the year 1891" estops the municipality from tendering proof, as against a bona fide holder of the securities, that they were not so authorized, and that certain preliminary action necessary to validate the bonds had not in fact been taken. A power having been vested in the city, by the act to which reference is made in the bond, to issue such obligations for the purpose therein expressed, an innocent purchaser was entitled to rely on the representation that they were authorized by the act, the same being a representation, in substance, that all antecedent conditions named in the act had been duly performed. City of Huron v. Second Ward Sav. Bank, 30 C. C. A. 38, 86 Fed. 272; National Life Ins. Co. of Montpelier v. Board of Education of Huron, 27 U. S. App. 244, 266, 10 C. C. A. 637, and 62 Fed. 778; E. H. Rollins & Sons v. Board of Com'rs, 49 U. S. App. 399, 26 C. C. A. 91, and 80 Fed. 692; School Dist. v. Stone, 106 U. S. 183, 187, 1 Sup. Ct. 84; Town of Colloma v. Eaves, 92 U. S. 484; Commissioners v. Bolles, 94 U. S. 104; County Com'rs v. Beal, 113 U. S. 227, 238, 239, 5 Sup. Ct. 433; Cairo v. Zane, 149 U. S. 122, 13 Sup. Ct. 803; Evansville v. Dennett, 161 U. S. 434, 443, 16 Sup. Ct. 613; Commissioners v. Block, 99 U. S. 686; San Antonio v. Mehaffy, 96 U. S. 312.

With respect to the claim that the bonds in controversy were invalid because the bridge as projected did not lie wholly within the corporate limits of the city of South St. Paul, and that they were further affected by the fact that at the date of their issue the secretary of war had not fixed the exact location of the structure or approved of the proposed location, it may be said, in this connection, that neither of these considerations can be held to have impaired the validity of the bonds. Such considerations could in no event impair their validity in the hands of an innocent purchaser for value. The power to issue bonds, which was granted by section 18 of the act of April 23, 1891, was doubtless conferred for the express purpose of enabling the city to aid in the construction of a bridge across the Mississippi river, a part of which structure would necessarily be on the opposite or east bank of the river, and outside of the city limits; and the bridge so had in view was of as great advantage to the city as it would have been if located wholly within the corporate boundaries. Ample authority is found in the act for the construction of the bridge now in question.

We are also of opinion that a purchaser of the bonds in the open market was not bound to inquire whether the secretary of war had approved of the proposed location of the bridge on account of which they purported to have been issued. The congress of the United States had authorized the bridging of the Mississippi river with a railroad, wagon, and foot passenger bridge "at a point suitable to the interest of navigation, * * * at or near the city of South St. Paul." This act was passed on April 26, 1890 (26 Stat. 69, c. 163). And, since the city had undertaken to aid in the construction of such a bridge across the river at that point, it was the duty of the city authorities to obtain from the secretary of war an approval of the plan

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of the structure and its proposed location before the bonds were issued; and a purchaser of the bonds in the open market was entitled to presume from their mere presence in the market that this duty had been duly performed, and that such approval had been obtained.

The validity of the bonds is also challenged on the ground that they were issued to aid in the construction or equipment of a railroad, and were in excess of the amount which could be lawfully issued for that purpose, under section 15, art. 9, of the constitution of the state of Minnesota. That section of the constitution, in substance, limits the sum which any municipal corporation may contribute, in the shape of bonds or otherwise, to aid in the construction or equipment of any railroad, to 5 per centum of the value of the taxable property within such corporation, to be ascertained by the last assessment on said property for state and county taxation previous to incurring such indebtedness; and it is assumed, in support of the argument in behalf of the city, not only that the bonds in suit were railroad aid bonds, within the meaning of the constitution, but also that the bonds were not issued until 1894, when the assessment of the city had fallen to a point which would not warrant an issue of bonds to the amount of $75,000, that being the amount which was actually voted and issued. We are strongly disposed to conclude that bonds like those involved in the present controversy, which were issued in aid of building a bridge over the Mississippi river that was designed for the use of wagons and pedestrians as well as for the transportation of railroad trains, should be esteemed bonds issued in aid of a local improvement, and that they were in no proper sense "railroad aid bonds," within the meaning of the constitution. But, be this as it may, these bonds were executed on May 29, 1891. The trial court so found, and that finding must be regarded as conclusive. The last assessment preceding that date, according to the statement of counsel for the city, showed that the aggregate amount of city property subject to taxation was $1,654,343, which was a sum more than sufficient to warrant the issue here in question. The result is that the plea that the issue was excessive, and in violation of the constitution, is, in any event, untenable.

It is finally urged that the bonds were void upon their face, because they did not mature for more than 30 years after they were executed, and for that reason were not authorized by section 18 of the act of April 23, 1891. The fact is, however, that the bonds did not begin to bear interest until June 1, 1894, and they were payable on that day 30 years thereafter. This was a substantial compliance with the law, as has several times been held, and the bonds were not void, nor the validity thereof in any wise affected, for the reason last assigned. Township of Rock Creek v. Strong, 96 U. S. 271, 277; Dows v. Town of Elmwood, 34 Fed. 114, 117.

The result is that the record before us discloses no error, and the judgment of the circuit court is therefore affirmed.

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MEMORANDUM DECISIONS.

(88 Fed. 985.)

ABILENE v. FOLEY. (Circuit Court of Appeals, Fifth Circuit. February 25, 1897.) No. 510. In Error to the Circuit Court of the United States for the Northern District of Texas. T. J. Freeman, Wm. Alexander, W. H. Clark, and W. L. Hall, for plaintiff in error. W. L. McDonald, for defendant in error. Dismissed pursuant to the twentieth rule.

(88 Fed. 985.)

ALABAMA G. S. R. CO. v. CARROLL. (Circuit Court of Appeals, Fifth Circuit. June 7, 1897.) No. 516. In Error to the Circuit Court of the United States for the Southern Division of the Northern District of Alabama. A. G. Smith and James Weatherly, for plaintiff in error. Sam. Will John and Richard L. Brooks, for defendant in error. Reversed and remanded, with directions to dismiss for want of jurisdiction. A petition for a rehearing having been allowed, the opinion was on June 7, 1897, withdrawn by order of the court. See 28 C. C. A. 207, 84 Fed. 772.

(88 Fed. 985.)

AMERICAN CONST. CO. v. PENNSYLVANIA CO. FOR INS. ON LIVES AND GRANTING ANNUITIES. (Circuit Court of Appeals, Fifth Circuit. April 20, 1897.) No. 520. Appeal from the Circuit Court of the United States for the Southern District of Florida. H. Bisbee and C. D. Rinehart, for appellant. J. C. Cooper, for appellee. Dismissed pursuant to the twentieth rule.

(87 Fed. 1004.)

CALDWELL et al. v. ALLEN et al. (Circuit Court of Appeals, Fifth Circuit. May 21, 1898.) No. 726. In Error to the Circuit Court of the United States for the Northern District of Alabama. Caldwell & Johnston, in proper. Cabiness & Weakley, for defendants in error. Dismissed, per stipulation.

(87 Fed. 1004.)

CALIFORNIA REDWOOD CO. v. LITLE. (Circuit Court of Appeals, Ninth Circuit. May 3, 1898.) No. 403. Appeal from the Circuit Court of the United States for the Northern District of California. Page, McCutchen & Eells, for appellant. Barclay Henley and S. V. Costello, for appellee. Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This case presents substantially the same questions that were involved in Mortgage Co. v. Hopper, 12 C. C. A. 293, 64 Fed. 553, 559. We are asked to review the question relative to the rights of bona fide purchasers, for value, before the issuance of a patent. We adhere to the views expressed upon this point in the Hopper Case, repeated and followed by this court in Diller v. Hawley, 26 C. C. A. 514, 81 Fed. 651, 655; and, upon the principles therein announced, the judgment of the circuit court is affirmed, with costs.

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(87 Fed. 1004.)

CALIFORNIA REDWOOD CO. v. MAHAN. (Circuit Court of Appeals, Ninth Circuit. May 3, 1898.) No. 404. Appeal from the Circuit Court of the United States for the Northern District of California. Page, McCutchen & Eells, for appellant. Barclay Henley and S. V. Costello, for appellee. Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a companion case to that of California Redwood Co. v. Litle, ubi supra; but the special point relied upon by appellant in this case is that the cancellation of the entry for fraud was made without notice to the claimant or parties interested. The facts are identical with those presented upon this point in Mortgage Co. v. Hopper, 12 C. C. A. 293, 64 Fed. 553, 556; and, upon the principles announced in that case and the authorities there cited, the judgment of the circuit court is affirmed, with costs.

(87 Fed. 1004.)

CARTTER et al. v. JACKSONVILLE & K. W. RY. CO. (Circuit Court of Appeals, Fifth Circuit. May 21, 1898.) No. 700. Appeal from the Circuit Court of the United States for the Southern District of Florida. Stephen E. Foster, for appellant. T. M. Day, Jr., J. C. Cooper, and R. H. Liggitt, for appellees. Dismissed, per stipulation of counsel.

(88 Fed. 986.)

CITY OF CLEVELAND v. HAWGOOD & AVERY TRANSIT CO. (Circuit Court of Appeals, Sixth Circuit. May 5, 1898.) No. 544. Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio. George L. Phillips and Miner G. Norton, for plaintiff in error. Harvey D. Goulder, for defendant in error. No opinion. Judgment affirmed.

(88 Fed. 986.)

CITY OF WABASHA v. CHICAGO, M. & ST. P. RY. CO. (Circuit Court of Appeals, Eighth Circuit. May 4, 1896.) No. 760. In Error to the Circuit Court of the United States for the District of Minnesota. A. H. Young and Daniel Fish, for plaintiff in error. H. H. Field and W. H. Norris, for defendant in error. Dismissed for want of jurisdiction, with costs.

(88 Fed. 986.)

CUYLER & WOODBURN R. CO. v. ANNISTON NAT. BANK. (Circuit Court of Appeals, Fifth Circuit. November 23, 1896.) No. 548. Appeal from the Circuit Court of the United States for the Southern District of Georgia. Docketed and dismissed pursuant to the sixteenth rule on motion of W. K. Miller, for appellees.

(88 Fed. 986.)

DEL MONTE MINING & MILLING CO. v. LAST CHANCE MINING & MILLING CO. (Circuit Court of Appeals, Eighth Circuit.) Questions of law certified to the supreme court of the United States. See 18 Sup. Ct. 895.

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(87 Fed. 1004.)

DUNKLIN TP., GREENVILLE COUNTY, S. C., v. WELLS. (Circuit Court of Appeals, Fourth Circuit. May 3, 1898.) No. 250. Appeal from the Circuit Court of the United States for the District of South Carolina. B. M. Shuman (J. A. McCullough, on brief), for plaintiff in error. H. J. Haynsworth (of Haynsworth & Parker), for defendant in error. Before GOFF, Circuit Judge, and JACKSON and PAUL, District Judges.

JACKSON, District Judge. The controlling questions presented for the consideration of this court in the record in this case are similar to those presented in the case of Township of Ninety-Six v. Folsom, 87 Fed. 304,[1] which have been maturely considered by the court; and, for the reason assigned in the opinion of the court in that case, the judgment of the court below in this case is without error, the demurrer to the complaint was properly overruled, and we concur fully with the trial judge in his action on the points raised during the trial of the jury. Affirmed.

(88 Fed. 986.)

THE FAVORITE. (Circuit Court of Appeals, Sixth Circuit. May 12, 1898.) No. 576. In Error to the District Court of the United States for the Northern District of Ohio. Orestes C. Pinney, for plaintiff in error. Goulder & Holding, on brief for defendants in error. Dismissed for want of jurisdiction.

(88 Fed. 987.)

FLINT v. CHRISTALL. (Circuit Court of Appeals, Second Circuit.) Questions of law certified to the supreme court of the United States. See 18 Sup. Ct. 831.

(88 Fed. 987.)

FOLSOM v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 4, 1896.) No. 579. In Error to the Supreme Court of the Territory of New Mexico. Dismissed for want of jurisdiction.

(88 Fed. 987.)

FRANTZ v. WEIGAND. (Circuit Court of Appeals, Fifth Circuit. May 17, 1897.) No. 575. In Error to the Circuit Court of the United States for the Eastern District of Louisiana. W. O. Hart, for plaintiff in error. Frank McGloin, for defendant in error. Dismissed pursuant to the twentieth rule.

(88 Fed. 987.)

GLYNN et al. v. KEYSER et al. KEYSER et al. v. GLYNN et al. (Circuit Court of Appeals, Fifth Circuit. May 24, 1898.) No. 652. Appeal and Cross Appeal from the District Court of the United States for the Northern District of Florida. J. P. Kirlin and John Eagan, for Dashper E. Glynn

[1] 30 C. C. A. 657.

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& Son. John C. Avery, for W. S. Keyser & Co. Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PER CURIAM. The questions raised in this case are identical with those in Wood v. Keyser, 31 C. C. A. 358, 87 Fed. 1007, and Steamship Co. v. Keyser (just decided) 31 C. C. A. 347, 87 Fed. 1005, and for the same reasons the judgment of the district court is affirmed.

(87 Fed. 1005.)

HOEFFNER v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 9, 1898.) No. 986. In Error to the District Court of the United States for the Eastern District of Missouri. Thomas B. Harvey, for plaintiff in error. Edward A. Rozier, U. S. Atty., and Walter D. Coles, Asst. U. S. Atty., for defendant in error. Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. This case presents the same questions that have been passed upon in case No. 985, just decided (Hoeffner v. U. S., 30 C. C. A. 610, 87 Fed. 185); and, following the conclusions therein reached, the judgment in the trial court is affirmed.

(88 Fed. 987.)

HOWISON v. ALABAMA COAL & IRON CO. (Circuit Court of Appeals, Fifth Circuit. December 21, 1896.) No. 541. In Error to the Circuit Court of the United States for the Northern District of Alabama. Alexander T. London, for plaintiff in error. John B. Knox and S. J. Bowie, for defendant in error. Dismissed pursuant to the twentieth rule.

(88 Fed. 988.)

INTERSTATE SAV., LOAN & TRUST CO. v. SHAW et al. (Circuit Court of Appeals, Sixth Circuit. May 12, 1898.) No. 579. In Error to the Circuit Court of the United States for the District of Kentucky. Michael G. Heintz, for plaintiff in error. E. C. Pyle, for defendants in error. No opinion. Affirmed.

(88 Fed. 988.)

JOHNSON v. CITIZENS' ST. R. CO. OF INDIANAPOLIS, IND. (Circuit Court of Appeals, Sixth Circuit. May 10, 1898.) No. 568. In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio. W. B. Sanders, for plaintiff in error. W. H. H. Miller, for defendant in error. No opinion. Affirmed.

(88 Fed. 989.)

LYONS v. OTERI. (Circuit Court of Appeals, Fifth Circuit. May 17, 1897.) No. 579. Appeal from the District Court of the United States for the Eastern District of Louisiana. Dismissed, pursuant to the twenty-third rule, for failure to print record.

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(88 Fed. 990.)

RIVER MACHINE & BOILER CO. v. DUFFY et al. (Circuit Court of Appeals, Sixth Circuit. May 12, 1898.) No. 576. In Error to the District Court of the United States for the Northern District of Ohio. O. C. Pinney, for plaintiff in error. Dismissed for want of jurisdiction.

(87 Fed. 1006.)

THE ST. PAUL. VANELIUS v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. February 7, 1898.) No. 181. Appeal from the District Court of the United States for the District of Alaska. Warren Gregory, for appellant. Charles A. Garter, for the United States. Before GILBERT, ROSS, and MORROW, Circuit Judges.

PER CURIAM. This case is precisely similar to the case entitled "La Ninfa," heretofore decided by this court, and reported in 44 U. S. App. 648, 21 C. C. A. 434, and 75 Fed. 513. On the authority of that case, the decree appealed from is reversed, and the cause remanded, with instructions to the district court to dismiss the libel.

(88 Fed. 990.)

SOUTHERN RY. CO. v. AVERA. (Circuit Court of Appeals, Fifth Circuit. April 22, 1897.) No. 586. In Error to the Circuit Court of the United States for the Northern District of Georgia. R. T. Dorsey and Sanders McDaniel, for plaintiff in error. Dismissed pursuant to the twentieth rule.

(87 Fed. 1006.)

STANDARD OIL CO. v. BELL et al. (Circuit Court of Appeals, Fifth Circuit. May 24, 1898.) No. 598. In Error to the Circuit Court of the United States for the Southern District of Florida. This is an action brought by William J. Bell and others against the Standard Oil Company to recover possession of land and damages for the occupation and use thereof. Judgment for plaintiffs, and defendant brings error. Affirmed. J. C. Cooper, W. W. Howe, W. B. Spencer, and G. B. Cocke, for plaintiff in error. H. Bisbee, for defendants in error. Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

McCORMICK, Circuit Judge. This case is identical in its substantial issues with the case of Railroad Co. v. Bell, 31 C. C. A. 9, 87 Fed. 369, the plaintiff in error in this case claiming under the Florida Central & Peninsular Railroad Company; and, on the ground and for the reasons given and suggested in the opinion in that case, the judgment of the circuit court in this case is affirmed.

(88 Fed. 990.)

THE THREE FRIENDS. (Circuit Court of Appeals, Fifth Circuit. February 1, 1897.) No. 563. Appeal from the District Court of the United States for the Southern District of Florida. No opinion. Taken to the supreme court of the United States before argument by writ of certiorari, and by that court reversed, and remanded to the district court. See 166 U. S. 1, 17 Sup. Ct. 495.

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(87 Fed. 1006.)

TRUMAN v. DEERE IMPLEMENT CO. (Circuit Court of Appeals, Ninth Circuit. February 21, 1898.) No. 377. Appeal from the Circuit Court of the United States for the Northern District of California. John L. Boone, for appellant. M. A. Dorn, D. S. Dorn, and Chas. E. Nouges, for appellee. Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This case involves the same questions as were presented and decided in Truman v. Holmes, 31 C. C. A. 215, 87 Fed. 742; and, upon the authority of that case, the judgment of the circuit court is affirmed, with costs.

(88 Fed. 990.)

UNITED STATES v. BOWERSOCK et al. (Circuit Court of Appeals, Eighth Circuit. December 11, 1893.) No. 306. In Error to the Circuit Court of the United States for the District of Kansas. Solon O. Thatcher, for defendants in error. Dismissed for failure to print record, pursuant to the twenty-third rule.

(88 Fed. 990.)

UNITED STATES v. SALAMBIER. (Circuit Court of Appeals, Second Circuit.) Questions of law certified to the supreme court of the United States. See 18 Sup. Ct. 771.

(87 Fed. 1006.)

WESTENFELDER v. GREEN et al.

(Circuit Court of Appeals, Ninth Circuit. May 17, 1898.)

No. 423.

APPEAL—RECORD.

Appeal from the Circuit Court of the United States for the District of Oregon. Before ROSS and MORROW, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This was, apparently, a suit in equity to quiet complainant's alleged title to a lot of land in the city of Portland, Or. See 76 Fed. 925, 78 Fed. 892. It was argued, both orally and by brief, on behalf of the respective parties, as if there was an appeal here from the decree of the court below. An examination of the record, however, fails to disclose any such appeal; and, if it did, there is nothing in the transcript showing the case upon which the decree printed therein was based. Indeed, there is nothing in it properly certified or identified. The pretended appeal, together with all of the proceedings herein, is accordingly dismissed.

(88 Fed. 991.)

WHITMIRE v. HUDSON et al. (Circuit Court of Appeals, Fifth Circuit. May 24, 1898.) No. 658. Appeal from the District Court of the United States for the Northern District of Florida. W. A. Blount and A. C. Blount, for appellant. B. C. Tunison, for appellees. Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PER CURIAM. This is a libel in personam to recover salvage for services in saving 550 sticks of timber adrift on the tide waters of Escambia Bay. The case is in all respects like that of Whitmire v. Cobb (just decided) 31 C. C. A. 395, 88 Fed. 91, and for the same reasons the decree of the district court is affirmed.

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ACCOUNT STATED.

§ 1. Pleading.

A mere allegation that, on a certain date, plaintiff "rendered to defendant a statement of said account" (being the account sued on), is not equivalent to an averment that the account between the parties had been stated, showing a specific sum due, so as to make the suit one on an account stated.

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A decree in admiralty, awarding libelants a definite sum, adjudging that a maritime lien exists therefor, and directing the sale of the vessel and payment of the proceeds into the registry to await the further order of the court, is a final appealable decree.
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§ 2. Right of review—Persons entitled.
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—Tuttle v. Claflin, 88 Fed. 122; In re Lee, Id.....31 C. C. A. 419

§ 3. —— Estoppel or waiver affecting right.
Plaintiff brought ejectment against defendant railroad company for land upon which it had wrongfully entered and constructed its road. The court decided that the action would not lie, but, upon plaintiff's request, permitted him to file an amended complaint for damages only. *Held* that, by electing to amend, plaintiff waived his right to a review of the question as to his right to maintain the action in its original form, and was not aided by a stipulation agreeing that such question should be submitted to the court of appeals.
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—Tuttle v. Claflin, 88 Fed. 122; In re Lee, Id.....31 C. C. A. 419

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—Hart v. Bowen, 86 Fed. 877.....31 C. C. A. 31

Under rule 11 of the circuit court of appeals (21 C. C. A. cxi., and 78 Fed. cxi.), requiring the assignment of errors to quote the full substance of evidence alleged to have been erroneously admitted or rejected, and to set out the part of the charge referred to totidem verbis, assignments that "the court erred in permitting evidence as shown in bills of exceptions numbers two and three," which errors can only be ascertained by a careful reading of a voluminous record, and that "the court erred in its charge," etc., referring to marked lines and numbers in the written opinion for instructions erroneously given and refused, will not be considered.
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§ 9. —— Discretion of court.
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—Dooley v. Pease, 88 Fed. 446.....31 C. C. A. 582

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§ 1. Compensation and lien of attorney.

After entry of a decree in a trial court for merely nominal damages, counsel for complainant entered into a contract with him whereby counsel agreed to prosecute an appeal, and use all reasonable efforts to secure a reversal, complainant agreeing to pay all necessary disbursements, and to give counsel 20 per cent. of the gross amount of any recovery which should be paid, after deducting the expenses and disbursements. A reversal of the decree was thereafter obtained with directions for a substantial recovery, and thereupon the opposite party moved the court for a modification of the proposed mandate, which motion was successfully opposed by complainant's counsel. Application was then made to the supreme court for a writ of certiorari, which motion was also successfully opposed by plaintiff's counsel. *Held*, that the contract for compensation covered, not

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merely the services rendered in procuring the reversal, but also the subsequent services rendered in both courts.
—Tuttle v. Claflin, 88 Fed. 122; In re Lee, Id.....31 C. C. A. 419

Where an assignee for benefit of creditors, who was engaged in prosecuting a suit for infringement of a patent belonging to the estate, contracted with a third person, who was suing the same party for infringement on another patent, to unite their interests for their mutual benefit, and authorized such third person to carry on or settle the litigation at his own expense, and divide the net amount recovered equally between them, *held*, that the latter had authority to employ a solicitor and counsel, who should be entitled to a lien for their fees on the fund recovered by their efforts. 86 Fed. 964, affirmed.
—Tuttle v. Claflin, 88 Fed. 122; In re Lee, Id.....31 C. C. A. 419

The rule giving attorneys and solicitors a lien upon the recovery for compensation for their services extends also to expenses incurred in rendering the services.
—McDougall v. Hazelton Tripod-Boiler Co., 88 Fed. 217; Hazelton Tripod-Boiler Co. v. McDougall, Id.....31 C. C. A. 487

The solicitors for a creditor commenced a suit against an insolvent corporation, in its behalf, and in behalf of all other creditors who might intervene and contribute to the expense, and procured the appointment of a receiver. Subsequently they carried on other litigation in the name of their client, but to the benefit of the creditors. *Held*, that they were entitled to compensation out of the general fund for the services rendered after, as well as those rendered before, the appointment of the receiver.
—Burden Central Sugar-Refining Co. v. Ferris Sugar-Mfg. Co., 87 Fed. 810.....31 C. C. A. 233

After the sale of railroad property under a mortgage foreclosure suit consolidated with a creditors' bill, an order of reference was made to ascertain what property was not covered by the mortgage. In this order the special master was directed to notify appellee as counsel for the unsecured creditors. *Held*, that such order, made in the presence of counsel for other unsecured creditors, was sufficient to justify him in representing the creditors in the proceeding before the master, and to entitle him to fees out of the funds made, subject to the payment of the unsecured creditors.
—Central Trust Co. v. Ingersoll, 87 Fed. 427.....31 C. C. A. 41

The fact that the parties opposing such allowance owned a very large proportion of the unsecured debts allowed out of such fund was of no effect, where such claims were not filed until after the special master had ascertained and reported the property subject to the unsecured debts. Nor was it material that such opposing parties had bought or owned part of the debt which the counsel represented.
—Central Trust Co. v. Ingersoll, 87 Fed. 427.....31 C. C. A. 41

BAILMENT.

See "Pledges."

BANKS AND BANKING.

§ 1. Functions and dealings—Deposits.
Defendant deposited in bank a draft drawn on its New York correspondent, having theretofore slightly overdrawn its account. The draft was passed to defendant's credit, and checked against. On suspension of the bank, defendant stopped payment of the draft by telegram, whereupon plaintiff sued as receiver to recover on the draft. *Held*, that he was entitled to recover only the amount due the bank after charging back the draft.
—Stapylton v. Cie Des Phosphates De France, 88 Fed. 53.....31 C. C. A. 383

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§ 2. National banks.

In order to convict a national bank officer of wrongfully certifying checks, it is not necessary to show that he had actual knowledge that the account against which the checks were drawn was not sufficient; it is enough if he willfully refrained from investigation, in order to avoid knowledge.

—Spurr v. United States, 87 Fed. 701.....31 C. C. A. 202

Upon the trial of a national bank officer for official misconduct, evidence as to the defendant's reputation for honesty and integrity should be limited to such reputation down to the time of the failure of the bank.

—Spurr v. United States, 87 Fed. 701.....31 C. C. A. 202

In a prosecution against a national bank president for unlawfully certifying checks, it is not error to instruct the jury that the presumption is that he had knowledge of the condition of the account upon which the checks were drawn, where the same instruction cautions them that such presumption may be rebutted by evidence that the defendant did not in fact have such knowledge.

—Spurr v. United States, 87 Fed. 701.....31 C. C. A. 202

The death of the principal before indictment is no obstacle to the prosecution and punishment of one charged with aiding and abetting an officer, clerk, or agent of a national bank to abstract, misapply, or embezzle the funds thereof, in violation of Rev. St. § 5209, which makes such offense a misdemeanor.

—Gallot v. United States, 87 Fed. 446.....31 C. C. A. 44

In order that a trust fund may constitute a preferential claim against the funds of a national bank in the hands of a receiver, it must appear that these funds were actually augmented by the receipt of the trust fund. And if the trust fund was created merely by a check on the same bank drawn by a general depositor in favor of the trustee, the amount of which was then shifted to the latter's credit, there is no right to a preference.

—Beard v. Independent Dist. of Pella City, 88 Fed. 375..31 C. C. A. 562

BILLS AND NOTES.

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§ 1. Negotiability and transfer—Transfer without indorsement.

The assignee of an unindorsed negotiable note takes only an equitable title, but the note then stands on the same footing as nonnegotiable paper, and he may, under the Washington Code, maintain in his own name an action against the maker.

—Harrisburg Trust Co. v. Shufeldt, 87 Fed. 669.....31 C. C. A. 190

The fact that a note is transferred without indorsement is sufficient to put the transferee upon inquiry as to all equitable defenses that existed at the time of the transfer; but a "set-off" is not a defense, as that term is ordinarily used, whether the title to the note be equitable or legal, and is never pleadable as a defense unless expressly made so by statute.

—Harrisburg Trust Co. v. Shufeldt, 87 Fed. 669.....31 C. C. A. 190

§ 2. Presentment and demand.

When a note is made payable five days after demand, an express demand in explicit terms is not in all cases and for all purposes necessary. If the payee signifies to the maker his desire for payment in such manner as to be the equivalent of a request, this is sufficient.

—McDougall v. Hazelton Tripod-Boiler Co., 88 Fed. 217; Hazelton Tripod-Boiler Co. v. McDougall, Id.....31 C. C. A. 487

BONA FIDE PURCHASERS.

Of bonds, see "Municipal Corporations," § 6.
Of land, see "Vendor and Purchaser," § 2.

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BONDS.

Municipal bonds, see "Municipal Corporations," §§ 4, 6.
Sureties on bonds, see "Principal and Surety."

BRIDGES.

Construction by cities, see "Municipal Corporations," § 4.

CARRIERS.

Evidence in actions for personal injuries to passengers, see "Evidence," § 1.
Lien against vessel for breach of passage contract, see "Maritime Liens."

§ 1. Carriage of passengers—Personal injuries.

A carrier's obligation to transport his passengers safely cannot be shifted from himself by delegation to an independent contractor, and it extends to all the agencies employed, and includes the duty of protecting the passenger from an injury caused by the act of any subordinate or third person engaged in any part of the service required by the contract of transportation.

—Barrow S. S. Co. v. Kane, 88 Fed. 197.....31 C. C. A. 452

The agents of a steamship company were charged with the duty of transferring its passengers by tugs or tenders from the port of embarkation, and putting them on board its ships. For this they received a commission, paying the expenses themselves. They employed a steam tender and two persons in charge thereof, and these persons, while plaintiff was being transferred, assaulted him, and confined him in a room of the tender, apart from the other passengers. *Held*, that the steamship company was liable in damages for their acts.

—Barrow S. S. Co. v. Kane, 88 Fed. 197.....31 C. C. A. 452

One who accepts free transportation on a railroad at his own risk can nevertheless recover for injuries caused by negligence of the railroad company or its employés, not his fellow servants.

—Chamberlain v. Pierson, 87 Fed. 420.....31 C. C. A. 157

Employés of an express company, who had no knowledge of a contract between such company and a railroad company to the effect that such employés were to be furnished free transportation over the railroad at their own risk while in the service of the express company, are not bound thereby.

—Chamberlain v. Pierson, 87 Fed. 420.....31 C. C. A. 157

§ 2. —— Ejection of passengers and intruders.

After the presence of a person stealing a ride on a train is discovered, the railroad company owes him the duty which humanity imposes, and his efforts to cling to the train to prevent falling under the wheels cannot be considered as a resistance to those attempting to remove him while the train is in motion.

—Southern Ry. Co. v. Shaw, 86 Fed. 865.....31 C. C. A. 70

Where a person stealing a ride on a train continues to get on after being put off, it does not entitle the railroad company to use increased force, especially where the trespasser is a child 10 years old.

—Southern Ry. Co. v. Shaw, 86 Fed. 865.....31 C. C. A. 70

CHARGE.

To jury in civil actions, see "Trial," §§ 3–6.

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CHARTER PARTIES.

See "Shipping," §§ 1, 3.

CHATTEL MORTGAGES.

See "Pledges."

CHECKS.

Deposit of, see "Banks and Banking," § 1.

CIRCUIT COURTS OF APPEALS.

See "Courts," § 6.
Review in admiralty cases, see "Admiralty," § 2.

CITIES.

See "Municipal Corporations."

CITIZENS.

Citizenship as ground of jurisdiction of United States courts, see "Courts," § 3.

CLAIM AND DELIVERY.

See "Replevin."

COLLATERAL ATTACK.

On judgment, see "Judgment," § 1.

COLLATERAL SECURITY.

See "Pledges."

COLLISION.

§ 1. Steam vessels meeting or crossing.

Two steamers, one ascending and the other descending along the left bank of a broad, straight stretch of the Mississippi river, *held* both in fault for a collision between them,—the descending vessel for faulty construction, rendering it difficult to check her speed, and for being out of her proper course, in the path of ascending vessels; the ascending vessel for starboarding her helm instead of porting, as required by navigation rules 18 and 19 (Rev. St. § 4233).

—Jakobsen v. Springer, 87 Fed. 948; Springer v. Jakobsen, Id..... 31 C. C. A. 315

§ 2. Vessels in tow.

A tug starting out into the Delaware river, from behind piers which obstruct her view, with a tow on a hawser, must exercise caution, but is not bound absolutely to ascertain beforehand whether any vessel is approaching; and where she gives the proper signal to enable a vessel actually approaching to avoid the tow by proper and reasonable navigation, she is not to be held liable for a collision between them.

—Balano v. The Illinois, 87 Fed. 574.....31 C. C. A. 111

Where a schooner towed by a tug on a hawser was struck in the Delaware river, by a passing steamship, shortly after the tug and steamer had emerged from behind piers that obstructed their view, *held*, that the

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steamship was solely at fault, in that, while proceeding in a narrow channel, where vessels and tows were likely to be encountered, she failed to perform her duty of running slowly, keeping a careful lookout, and listening attentively for signals.
—Balano v. The Illinois, 87 Fed. 574.....31 C. C. A. 111

§ 3. Suits for damages—Damages.
In cases of mutual fault, the personal representatives of passengers lost with one of the vessels may recover full damages from the other, but the latter may recoup one-half thereof from the half damages awarded to the owners of the former vessel.
—Jakobsen v. Springer, 87 Fed. 948; Springer v. Jakobsen, Id.....
31 C. C. A. 315

In case of mutual fault, members of the crew of one vessel, who lose personal effects, may recover from the other only half their damages.
—Jakobsen v. Springer, 87 Fed. 948; Springer v. Jakobsen, Id.....
31 C. C. A. 315

COMMISSIONERS.

In admiralty, see "Admiralty," § 1.

COMMON CARRIERS.

See "Carriers."

COMPENSATION.

Of attorney, see "Attorney and Client."
Of receivers, see "Receivers," § 2.
Of United States attorneys, see "District and Prosecuting Attorneys."
Salvage, see "Salvage," §§ 1, 2.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONAL SALES.

See "Sales."

CONFLICT OF LAWS.

Conflicting jurisdiction of courts, see "Courts," § 7.

CONSIDERATION.

Of contract, see "Contracts."

CONSTITUTIONAL LAW.

See "Taxation," § 1.
Subjects and titles of statutes, see "Statutes," § 1.

CONTRACTS.

See, also, "Sales"; "Vendor and Purchaser."
For construction of levees, see "Levees."
For public improvements, see "Municipal Corporations," § 1.
Of corporations, see "Corporations," § 6.

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Of insurance, see "Insurance."
Operation and effect of usury laws, see "Usury."
Parol or extrinsic evidence, see "Evidence," § 3.
Reformation, see "Reformation of Instruments."
With agent, see "Principal and Agent."

§ 1. Requisites and validity—Consideration.

A writing by which the subscribers promise to purchase from the owners certain shares of stock in a corporation, but which contains no agreement on the part of the owners to sell is not a valid contract for want of consideration, but is merely a unilateral undertaking, which may be retracted by a subscriber at any time before it has been acted upon by the owners by a transfer of the stock.

—Greene v. Sigua Iron Co., 88 Fed. 203.....31 C. C. A. 458

CONTRIBUTORY NEGLIGENCE.

See "Negligence."

CORPORATIONS.

See, also, "Banks and Banking"; "Municipal Corporations."
Contract of subscription stock, see "Contracts," § 1.
Taxation, see "Taxation," §§ 4–7.

§ 1. Capital, stock, and dividends—Transfer of shares.

See, also, post, § 4.

An agreement to purchase from a syndicate a certain number of shares of stock in a corporation, which had been subscribed for by the syndicate, but had not yet been issued, "or a proportionate part in case of oversubscription," is not a contract of purchase, which renders the purchaser a stockholder in the corporation on a subsequent transfer of the stock to him without his knowledge, but is merely an executory engagement to purchase, which renders him liable for damages for its breach on his failure to perform.

—Greene v. Sigua Iron Co., 88 Fed. 203.....31 C. C. A. 458

§ 2. —— Dividends.

While it is largely a matter of discretion with the directors whether to declare a dividend out of the profits, or use them in the business of the company, there is a limit to this discretion; and the courts will not allow them to oppress the holders of preferred stock by refusing to declare dividends when the net profits and character of the business clearly warrant dividends.

—Storrow v. Texas Consolidated Compress & Manufacturing Ass'n, 87 Fed. 612.....31 C. C. A. 139

The face value of preferred stock is in the nature of a debt against the corporation, and the interest thereon becomes a debt as soon as it can be shown there are profits wherewith to pay it.

—Storrow v. Texas Consolidated Compress & Manufacturing Ass'n, 87 Fed. 612.....31 C. C. A. 139

A bill by a holder of preferred stock against a corporation alleging that it has refused to pay its guarantied dividends on its preferred stock, and refused the holders thereof their rights; that judgments are being taken against it; that it is insolvent, and cannot be operated as a going concern with profit, and ought to be disintegrated, and the assets divided; that part of its property has been sold without authority; and asking for a lien, the foreclosure thereof, the marshaling of the assets, and the appointment of a receiver,—presents a case for a court of equity.

—Storrow v. Texas Consolidated Compress & Manufacturing Ass'n, 87 Fed. 612.....31 C. C. A. 139

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§ 3. Members and stockholders—Rights and liabilities as to corporation.

The relation between a corporation and a stockholder is a contractual one, and, although an express contract between them is not necessary to its creation, there must be an assent by both parties, either express or implied.

—Sigua Iron Co. v. Greene, 88 Fed. 207.....31 C. C. A. 477

In an action by a corporation to recover an assessment, entries of defendant's name in plaintiff's books as a stockholder are not prima facie evidence that he is such stockholder.

—Sigua Iron Co. v. Greene, 88 Fed. 207.....31 C. C. A. 477

In an action to recover from defendant assessments on certain shares of stock which had stood in his name for some years on the books of the corporation, where it was a material question whether defendant knew such fact, and acquiesced in it, and he testified that he did not, but it was shown that during a portion of the time defendant, who owned other stock, was a director of the corporation, the plaintiff was entitled to have such question submitted to the jury.

—Sigua Iron Co. v. Greene, 88 Fed. 207.....31 C. C. A. 477

§ 4. —— Liability for corporate debts and acts.

A person who approves, ratifies, or acquiesces in the transfer to him of shares of stock in a corporation is liable as a stockholder, though the transfer was originally made without his knowledge or consent.

—Sigua Iron Co. v. Greene, 88 Fed. 207.....31 C. C. A. 477

§ 5. Corporate powers and liabilities—Representation of corporation by officers and agents.

The discovery of a defect in an electric light pole by an employé of the company while in the line of his employment, and whose duty it is to report it to his superiors, is notice of such defect to the company.

—City of Denver v. Sherret, 88 Fed. 226.....31 C. C. A. 499

See, also, "Electricity."

§ 6. —— Contracts and indebtedness.

In an action against a corporation on a contract made between plaintiff and a third person, who is alleged to have acted in behalf of the corporation, it is not necessary to show that the contract was made under authority of a resolution of the board of directors; and, if there is evidence tending to show that it was made in the interest of the corporation, which recognized it, accepted its benefits, and acted on its provisions, this is sufficient to warrant the submission of the cause to the jury.

—McKenzie v. Poorman Silver Mines of Colorado, 88 Fed. 111.....31 C. C. A. 409

A corporation, which by resolution has empowered its president to pledge a contract, under which money is due it, as collateral security for money borrowed, cannot claim that the terms of the pledge made by the president are in excess of the authority conferred on him, when at the time of the pledge it was cognizant of all the particulars thereof, and received the money borrowed, and gave no sign of repudiating the transaction.

—McDougall v. Hazelton Tripod-Boiler Co., 88 Fed. 217; Hazelton Tripod-Boiler Co. v. McDougall, Id.....31 C. C. A. 487

COUNTERFEITING.

See "Forgery."

COUNTIES.

See "Municipal Corporations."

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COURTS.

Province of court and jury, see "Trial," § 3.
Review of decisions, see "Appeal and Error."

§ 1. United States courts—Jurisdiction and powers in general.

See, also, post, § 3.

Pol. Code Cal. § 3669, which provides for bringing suits against the state to recover taxes illegally collected, is not to be construed as a consent that such suits may be brought in the federal courts, since it contains provisions wholly inapplicable to the procedure of the federal courts, among them being a provision that, at a certain stage of the case, the treasurer may cause it to be removed into the superior court for the county of Sacramento.

—Smith v. Rackliffe, 87 Fed. 964.....31 C. C. A. 328

An action by a citizen of another state or by an alien against a state treasurer to recover taxes alleged to have been illegally collected by the state is, in effect, an action against the state, and cannot be maintained in a federal court in view of the prohibition of the eleventh amendment.

—Smith v. Rackliffe, 87 Fed. 964.....31 C. C. A. 328

A suit against state officers to enjoin them from certifying a tax, which they claimed to do by authority of the state, but which complainant avers to be without lawful authority, is not a suit against the state, within the meaning of the eleventh amendment.

—Taylor v. Louisville & N. R. Co., 88 Fed. 350.....31 C. C. A. 537

§ 2. —— Jurisdiction as dependent on nature of subject-matter.

The federal courts have jurisdiction of an action to recover possession of lands which plaintiff claims by virtue of pre-emption under the laws of congress, and which defendant claims under an act of congress granting land to railroads, and where it appears that defendant resisted the plaintiff's pre-emption claim in the different stages of the prosecution thereof.

—Florida C. & P. R. Co. v. Bell, 87 Fed. 369.....31 C. C. A. 9

The federal courts have jurisdiction of an action for mesne profits of land during the time between plaintiff's pre-emption entry and the issuance of the patent.

—Florida C. & P. R. Co. v. Bell, 87 Fed. 369.....31 C. C. A. 9

A suit brought in pursuance of Rev. St. § 2326, based upon an adverse claim made upon the filing of an application for a patent for mining ground, is a suit arising under the laws of the United States, and is within the jurisdiction of the circuit court. 75 Fed. 37, affirmed.

—Shoshone Min. Co. v. Rutter, 87 Fed. 801.....31 C. C. A. 223

§ 3. —— Jurisdiction as dependent on citizenship, character, or residence of parties.

See, also, ante, § 1.

The provision in the constitution giving the federal courts jurisdiction of controversies "between a state and citizens of another state, * * * and between a state, or the citizens thereof, and foreign states, citizens or subjects" (article 3, § 2), does not include an action against a state by a corporation created by act of congress.

—Smith v. Rackliffe, 87 Fed. 964.....31 C. C. A. 328

It is only where the jurisdiction of the federal courts depends upon diverse citizenship that the citizenship of a receiver of an incorporated party is material. If the jurisdiction is asserted on any other ground, the receiver stands upon the same footing as the corporation itself.

—Smith v. Rackliffe, 87 Fed. 964.....31 C. C. A. 328

Plaintiff, who had always resided in Kansas, as a member of her father's family, went to Denver, Colo., where she took an examination for the po-

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sition of teacher in the schools, intending, if successful, to remain there, but, if not, to return to Kansas. Before the result of her examination was known, she was seriously injured, and, when sufficiently recovered, returned to her father's home, in Kansas, where she remained. *Held*, that she did not cease to be a citizen of Kansas.
—City of Denver v. Sherret, 88 Fed. 226.....31 C. C. A. 499

The provision in the judiciary act of 1887-88 that no civil suit, of which federal courts have jurisdiction concurrently with the courts of the several states, shall be brought against any person in any other district than that whereof he is an inhabitant, does not apply to patent suits, exclusive jurisdiction over which is conferred by Rev. St. § 629, cl. 9. And hence, prior to the act of March 3, 1897, defining the jurisdiction of the federal courts in patent suits, a suit for infringement by a citizen of a state of the Union could be brought in any district where valid service could be made upon the defendant.
—Westinghouse Air-Brake Co. v. Great Northern Ry. Co., 88 Fed. 258.....31 C. C. A. 525

The act of March 3, 1897, defining the jurisdiction of the federal courts in patent suits, and authorizing the bringing of such suits in the district of which defendant is an inhabitant, or in which he "shall have committed the acts of infringement, and have a regular established place of business," did not repeal prior statutes, so as to oust the courts of jurisdiction in pending cases not falling within the jurisdictional limits prescribed in the new act.
—Westinghouse Air-Brake Co. v. Great Northern Ry. Co., 88 Fed. 258.....31 C. C. A. 525

That a state statute forbids the courts to enjoin collection of alleged illegal taxes, and restricts the remedy to an action to recover them back, does not affect the jurisdiction of a federal court, in cases of diverse citizenship, to entertain a suit to enjoin the state officers from certifying or collecting illegal taxes.
—Taylor v. Louisville & N. R. Co., 88 Fed. 350.....31 C. C. A. 537

§ 4. —— Jurisdiction dependent on amount or value in controversy.
A suit to stay an action on the law side of the court for recovery of lands, and to reform a deed thereto, is an ancillary suit, and the court has jurisdiction without regard to the amount in controversy.
—Hill v. Kuhlman, 87 Fed. 498.....31 C. C. A. 87

§ 5. —— State laws as rules of decisions.
The right to fasten a special trust upon funds held by the receiver of an insolvent bank in Iowa not having been created by any statute of that state, but depending upon the general principles of law and equity applicable to the circumstances, decisions of the supreme court of that state in relation thereto, if not in accord with the decisions of the supreme court of the United States or the decided weight of authority, do not constitute a rule of property binding on the federal courts.
—Beard v. Independent Dist. of Pella City, 88 Fed. 375..31 C. C. A. 562

§ 6. —— Circuit courts of appeals.
The circuit court of appeals has no jurisdiction of an appeal in proceedings in admiralty for limitation of liability, when the only question presented for review on the record is whether the district court had power and jurisdiction, after final disposition of the questions of limitation, to enter a decree in personam against the owners of the vessel for damages suffered by some of the interveners.
—The Annie Faxon, 87 Fed. 961.....31 C. C. A. 325

In the act of March 1, 1895, creating a court of appeals for the Indian Territory, and giving it full jurisdiction, civil and criminal, the provision of section 11 that "writs of error and appeals from the final decision of said appellate court shall be allowed, and may be taken to the circuit court of appeals for the Eighth judicial circuit, in the same manner and under the same regulations as appeals are taken from the circuit courts of the

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United States," conferred upon that court full appellate jurisdiction, including that in cases of infamous crimes, which was theretofore vested in the United States supreme court.
—Harless v. United States, 88 Fed. 97.....31 C. C. A. 397

If it is claimed that a law of a state is void because it contravenes the constitution of the United States, a circuit court of appeals has no jurisdiction of the case, although it may involve the consideration of many other questions.
—Wrightman v. Boone County, 88 Fed. 435.....31 C. C. A. 570

Under Act March 3, 1891, §§ 5, 6, a circuit court of appeals has no jurisdiction of a case in which the question is whether a state statute is void because it contravenes the constitution of the United States.
—Wrightman v. Boone County, 88 Fed. 435.....31 C. C. A. 570

§ 7. Concurrent and conflicting jurisdiction, and comity—State courts and United States courts.
The federal courts may, on habeas corpus, release a person after his conviction by a state court, as well as before trial, when he is in custody for an act done in pursuance of a law of the United States lawfully enacted.
—Campbell v. Waite, 88 Fed. 102.....31 C. C. A. 403

Rev. St. § 753, was designed to give relief to one in custody under a state law, not only when a state statute expressly imposes a penalty for executing a law of the United States or the process of its courts, but also when the state law is general in its terms, and applicable to all persons, and one is in custody under color thereof for an act which was in fact done in pursuance of federal authority.
—Campbell v. Waite, 88 Fed. 102.....31 C. C. A. 403

When, on habeas corpus, a person claims immunity from arrest and imprisonment, on the ground that he is held for an act done under federal authority, the federal courts may go behind the indictment or information found in the state court, and ascertain by independent inquiry whether the act which furnished the sole basis for the charge was in truth done in pursuance of a law of the United States.
—Campbell v. Waite, 88 Fed. 102.....31 C. C. A. 403

The arrest, under state authority, of federal officers or other persons for acts lawfully done in discharge of their duties under federal laws, presents a case of urgency, which warrants a discharge of the prisoner on habeas corpus without remitting him to the slower remedy of an appeal to the United States supreme court.
—Campbell v. Waite, 88 Fed. 102.....31 C. C. A. 403

COVERTURE.

See "Husband and Wife."

CRIMINAL LAW.

See, also, "Forgery."
Jurisdiction on appeal of circuit courts of appeal, see "Courts," § 6.
Offenses by bank officers, see "Banks and Banking," § 2.

§ 1. Evidence.
On a trial for mailing lewd and lascivious letters, in which the only issue for the jury is whether they were sent through the mails or in some other way, evidence of subsequent illicit relations between the writer and the addressee of the letters is irrelevant.
—Saffer v. United States, 87 Fed. 329.....31 C. C. A. 1

§ 2. Trial.
Where an indictment contains many counts, all alike, except as to amounts of money and dates of misapplication, it is sufficient to read one count in

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full to the jury, explain the difference, and state the amount and date charged in each of the other counts.
—Gallot v. United States, 87 Fed. 446.....31 C. C. A. 44

One indictment in 36 counts charged defendant with aiding in the abstraction of 36 specified amounts of money, at 36 specified dates. Another indictment charged him with aiding in the misapplication of the same amounts, upon the same dates. The two were tried together, and the jury returned a verdict of "guilty as charged." *Held*, that the verdict was definite, certain, responsive to the issues, and not a double conviction, the sentence imposed by the court being imprisonment for a less term than the maximum under any one count.
—Gallot v. United States, 87 Fed. 446.....31 C. C. A. 44

CUSTOMS DUTIES.

§ 1. Goods subject to duty.
The liquid creosote of commerce is not a "distilled oil," subject to duty, under Act Aug. 27, 1894, par. 60, but is a "product of coal tar" not specially provided for in said act, and entitled to free entry, under paragraph 443 thereof. 82 Fed. 311, affirmed.
—Wise v. Southern Pac. Co., 87 Fed. 863.....31 C. C. A. 263

§ 2. Refunding or recovery.
Money deposited with the collector as security (additional to that of the importer's bonds) for payment of duties assessed, and actually applied to the payment of duties, cannot be recovered back, in the absence of a protest, even if the duties were wrongfully assessed.
—Burroughs v. Erhardt, 88 Fed. 256.....31 C. C. A. 524

§ 3. Drawback.
Linseed-oil cake, manufactured from imported linseed, is not waste, but is a manufactured article, and was therefore entitled to the drawback provided by section 22 of the act of August 27, 1894 (28 Stat. 551).
—United States v. Dean Linseed-Oil Co., 87 Fed. 453....31 C. C. A. 51

Where linseed, on which a duty of 20 cents per bushel had been paid, was manufactured into oil and oil cake, and the oil cake exported, the drawback, under section 22 of the act of August 27, 1894, should be computed in proportion to the value which the oil cake bears to the oil, and not in proportion to the weight which the exported oil cake bears to the weight of the imported linseed. 78 Fed. 467, reversed.
—United States v. Dean Linseed-Oil Co., 87 Fed. 453....31 C. C. A. 51

DAMAGES.

For collision, see "Collision," § 3.

§ 1. Measure of damages—Injuries to the person.
An instruction that, if the jury found that plaintiff's injuries would impair her ability to carry on her occupation as school teacher in the future, she was entitled to recover as damages therefor the amount of salary she would have earned during the time she would be so disabled from pursuing her occupation, is erroneous; the true rule being that, upon all the evidence, the jury should award such fair sum as would, in their judgment, compensate for the lessened or destroyed ability to earn money, making due allowance for the contingencies and uncertainties that inhere in such matters. Thayer, Circuit Judge, dissenting.
—City of Denver v. Sherret, 88 Fed. 226.....31 C. C. A. 499

DEATH.

Of partner, see "Partnership."

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DECEDENTS.

Declarations of, see "Evidence," § 2.

DECLARATIONS.

As evidence in civil actions, see "Evidence," § 2.

DEEDS.

Reformation, see "Reformation of Instruments."

DEMURRAGE.

See "Shipping," § 8.

DEPOSITIONS.

See "Witnesses."

DEPOSITS.

In bank, see "Banks and Banking," § 1.

DISCHARGE.

From liability as surety, see "Principal and Surety."

DISTRIBUTION.

Of proceeds of sale of pledged property, see "Pledges," § 2.
—— on foreclosure, see "Mortgages," § 5.

DISTRICT AND PROSECUTING ATTORNEYS.

§ 1. United States attorneys—Compensation.

Under Rev. St. § 835, a United States attorney is entitled to all the fees and emoluments of his office, when, in addition to the amount of his necessary expenses, they do not exceed $6,000 per annum.

—United States v. Stanton, 87 Fed. 698.....31 C. C. A. 197

A district attorney is not entitled to extra compensation for services rendered in examining titles to sites for public buildings. U. S. v. Ady, 22 C. C. A. 223, 76 Fed. 359, followed.

—Sill v. United States, 87 Fed. 699; United States v. Sill, Id..... 31 C. C. A. 200

Section 824 of the Revised Statutes, which allows compensation to a district attorney for each day of the term where court is held at a place other than his place of abode, is limited by the act of congress of March 3, 1887 (24 Stat. 509, 541, c. 362), to each day when the court is opened by the judge for business, or business is actually transacted in the court.

—Sill v. United States, 87 Fed. 699; United States v. Sill, Id..... 31 C. C. A. 200

A district attorney is entitled to compensation for services rendered in investigating violations of the customs laws reported to him by a collector in accordance with section 838 of the Revised Statutes, and in which he determined that no prosecution should be instituted.

—Sill v. United States, 87 Fed. 699; United States v. Sill, Id..... 31 C. C. A. 200

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A district attorney is entitled to recover for clerk hire. U. S. v. Stanton, 87 Fed. 698, followed.
—Sill v. United States, 87 Fed. 699; United States v. Sill, Id..... 31 C. C. A. 200

DIVIDENDS.

On corporate stock, see "Corporations," § 2.

DOCKS.

See "Wharves."

DOCUMENTS.

Production of, see "Witnesses," § 1.

DOMICILE.

Residence as ground of jurisdiction, see "Courts," § 3.

DRAWBACK.

On re-exportation of goods after payment of duties, see "Customs Duties," § 3.

DUTIES.

See "Customs Duties."

EJECTION.

Of passenger, see "Carriers," § 2.

ELECTRICITY.

Liability of city for defects in lighting plant, see "Municipal Corporations," § 3.
Notice of defect in electric light pole, see "Corporations," § 5.

§ 1. Injuries incident to production or use.
An instruction that it is the duty of an electric light company having poles in the streets to make such inspection of them, "from time to time, as will determine and ascertain whether decay has taken place to such an extent as to render the timber unfit for use," is misleading, where the defect shown by the evidence was not visible from the outside, as apparently requiring that the inspection must be effectual, and going beyond the ordinary requirement of reasonable and ordinary care.
—City of Denver v. Sherret, 88 Fed. 226.....31 C. C. A. 499

The fact that plaintiff was walking diagonally across the street when struck by a falling electric light pole and wires does not tend to establish contributory negligence, in the absence of any facts which would charge her with notice that there was greater danger in so crossing.
—City of Denver v. Sherret, 88 Fed. 226.....31 C. C. A. 499

EMINENT DOMAIN.

§ 1. Compensation—Persons entitled.
The liability of a railroad company to make compensation for land taken for right of way is to the owner of the land at the time of the taking,

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and a subsequent vendee has no right of action unless the same is specially assigned to him.

—Northern Pac. R. Co. v. Murray, 87 Fed. 648.....31 C. C. A. 183

§ 2. Remedies of owners of property.

An application for an injunction pendente lite is addressed to the sound discretion of the court, and will be granted only to prevent irreparable injury; hence a corporation having instituted proceedings for the condemnation of land, and a controversy having arisen as to the value thereof, an injunction will not issue to restrain the corporation from entering upon the land until the termination of the condemnation suit, where the corporation has given bond in a sum sufficient to cover all damages, and the whole controversy appears to be rather an attempt to defeat the purpose of the corporation than a simple contest as to the value of the land.

—Davis v. Port Arthur Channel & Dock Co., 87 Fed. 512.....31 C. C. A. 99

Where a landowner, knowing that a railroad company has entered upon his land and is constructing its road without having procured the right of way, remains inactive until the road is in operation, he cannot maintain ejectment for the entry, but is restricted to an action for damages.

—Northern Pac. R. Co. v. Murray, 87 Fed. 648.....31 C. C. A. 183

EQUITY.

See, also, "Action"; "Reformation of Instruments."

Suits for infringement of patents, see "Patents," § 5.

§ 1. Pleading—Demurrer, exceptions, and motions.

There is no such thing as a demurrer to an answer in equity. The only way by which the sufficiency of the answer on its merits as a defense can be tested is by setting the case for hearing on the bill and answer.

—Walker v. Jack, 88 Fed. 576.....31 C. C. A. 462

The office of an exception to an answer is to raise the question whether the averments and denials thereof are sufficiently responsive to the allegations of the bill; and it cannot be treated as raising the question of the sufficiency of the answer as a defense on the merits.

—Walker v. Jack, 88 Fed. 576.....31 C. C. A. 462

A motion to strike out parts of the answer must be denied when not sufficiently specific to identify the portions to be stricken.

—McGorray v. O'Connor, 87 Fed. 586.....31 C. C. A. 114

§ 2. —— Verification.

A motion was made to strike out answers for want of certificates of counsel that the answer was well founded in law. The court denied the motion, "with leave to said defendants to further verify their answers, and add certificates, if so advised." *Held*, that this order was merely permissive, and not a decision, constituting the law of the case, that certificates to the answer were necessary.

—McGorray v. O'Connor, 87 Fed. 586.....31 C. C. A. 114

There is no equity rule requiring a certificate of counsel that an answer to the merits is well founded in law.

—McGorray v. O'Connor, 87 Fed. 586.....31 C. C. A. 114

§ 3. Hearing.

Where over 90 days elapse after the filing of the replication without the taking of any testimony by plaintiff or any motion to extend the time for taking testimony, and thereafter plaintiff gives notice of motions to strike out certain portions of the answer, which motions are denied, there is no error in then setting the case down for hearing on the bill and answers.

—McGorray v. O'Connor, 87 Fed. 586.....31 C. C. A. 114

§ 4. Masters, and proceedings before them.

Where, by stipulation and order of court based thereon, the cause is referred to a special master to take the proofs "and report the same to the

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court, with his findings of fact and conclusions of law thereon," the master's findings of fact are conclusive upon the court, so far as they are based on conflicting evidence, or the veracity of witnesses, or so far as there is evidence consistent with the finding. But this rule is confined strictly to findings of fact and does not include the interpretation and legal effect of documents, nor is it applicable when, by subsequent stipulation, additional evidence is introduced before the court.
—United States Trust Co. v. Mercantile Trust Co., 88 Fed. 140..... 31 C. C. A. 427

ESTOPPEL.

By judgment, see "Judgment," § 2.
To avoid or forfeit insurance policy, see "Insurance," § 5.

EVIDENCE.

See, also, "Witnesses."
In criminal cases, see "Criminal Law," § 1.
Reception at trial, see "Trial," § 1.

§ 1. Relevancy, materiality, and competency in general.
In an action against a railroad company to recover for injuries received in a wreck caused by the derailment of a train through the alleged negligence of the company, the record of the trial and conviction of persons charged with murder by feloniously derailing the train is not admissible in evidence on behalf of the defendant.
—Chamberlain v. Pierson, 87 Fed. 420.....31 C. C. A. 157

The period of time within which collateral transactions offered to show a guilty intent must have occurred is largely discretionary with the court.
—Spurr v. United States, 87 Fed. 701.....31 C. C. A. 202

Testimony of a witness, acquainted with the situation, that a railroad track is straight at a certain point, and a crossing in plain view for a certain distance, is competent.
—Baltimore & O. R. Co. v. Hellenthal, 88 Fed. 116....31 C. C. A. 414

Upon the trial of the president of a national bank for certifying checks without funds, evidence of speculations by the cashier with funds of the bank, with defendant's knowledge, is admissible for its bearing upon the right of the latter to rely upon the former's representations as to the state of the customer's accounts.
—Spurr v. United States, 87 Fed. 701.....31 C. C. A. 202

§ 2. Declarations.
Declarations made 10 days after the alleged delivery of an insurance policy cannot be admitted in evidence, as part of the res gestæ, to show such delivery.
—Mutual Life Ins. Co. v. Logan, 87 Fed. 637.....31 C. C. A. 172

In a suit by an executor to collect an insurance policy upon the life of his testator, when the issue is whether or not the contract was consummated, it is error to allow the plaintiff to testify to declarations by his testator going to show that he acknowledged liability upon his premium note, in order to show an acceptance by him of the policy. The suit being on the policy, and not on the note, such declarations cannot be considered as against interest.
—Mutual Life Ins. Co. v. Logan, 87 Fed. 637.....31 C. C. A. 172

§ 3. Parol and extrinsic evidence affecting writing.
The rule that parol evidence cannot be received to contradict or vary a written contract does not apply as against either party in an action between a party to the contract and a third person, as the estoppel on which the rule rests must be mutual, and the third person is not bound by the contract.
—Sigua Iron Co. v. Greene, 88 Fed. 207.....31 C. C. A. 477

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Where the only property owned by a mortgagor in a certain quarter section is the portion lying south of a creek, which portion contains about 30 acres, a mortgage describing land as "thirty acres in" said quarter section is not so vague and indefinite as to be incapable of being aided by parol proof.
—Vanvalkenberg v. American Freehold Land Mortgage Co., 87 Fed. 617.....31 C. C. A. 145

§ 4. Opinion evidence.
There is a recognized exception to the general rule requiring a witness to state facts, and not conclusions, which permits him to state his inference or opinion from facts he sees or knows, when he draws it from so many minor details that it is impossible to state them so that a jury could deduce a just inference from his narrative. But on an issue as to whether a building containing insured goods fell as the result of fire, or was blown down by a high wind, *held*, that the court committed no error in refusing to permit witnesses, who testified that they saw the roof on fire, and had seen other buildings on fire before, to give their opinions as to whether it was still standing when they saw it burning.
—Fred J. Kiesel & Co. v. Sun Ins. Office of London, 88 Fed. 243..... 31 C. C. A. 515

The general rule that witnesses should state facts, and not conclusions, should be strictly followed; and, whenever it is doubtful whether a case falls under the rule or one of its exceptions, the wise course is to place it under the rule.
—Fred J. Kiesel & Co. v. Sun Ins. Office of London, 88 Fed. 243..... 31 C. C. A. 515

FALSE IMPRISONMENT.

Arrest of passenger, see "Street Railroads."

FEDERAL COURTS.

See "Courts."

FEDERAL QUESTIONS.

See "Courts," § 2.

FEES.

Actions for, see "United States."
Of United States attorneys, see "District and Prosecuting Attorneys."

FELLOW SERVANTS.

See "Master and Servant," § 2.

FINDINGS.

By commissioner in admiralty, see "Admiralty," § 1.

FOOD.

§ 1. Power to make regulations.
The governor of the Soldiers' Home at Dayton, Ohio, in serving to the inmates as food oleomargarine furnished by the government, is not subject to the law of the state prescribing the manner in which oleomargarine shall be used in eating houses. The legislature having no power to regulate the conduct of such institution, the statute is to be construed as not applying thereto.
—In re Thomas, 87 Fed. 453.....31 C. C. A. 80

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FORECLOSURE.

Of mortgage, see "Mortgages," §§ 3–5; "Railroads," § 2.

FOREIGN RECEIVERS.

See "Receivers," § 3.

FORFEITURES.

Of wages of seamen, see "Seamen."

FORGERY.

§ 1. Nature and elements of offense.
One presenting accounts to the government cannot be convicted under Rev. St. §§ 5418, 5479, for forging the name of a justice of the peace to the affidavit attached thereto, unless it be done to defraud the United States.
—Staton v. United States, 88 Fed. 253.....31 C. C. A. 521

§ 2. Indictment.
An indictment charging that defendant forged the name of a justice of the peace to accounts presented by him to the government accounting officers, "with intent to defraud the United States," must be regarded as based on Rev. St. §§ 5418, 5479, and not on section 5421, which denounces the making, altering, forging, etc., of papers, for the purpose of "obtaining or receiving * * * from the United States or any of their officers or agents any sum of money."
—Staton v. United States, 88 Fed. 253.....31 C. C. A. 521

FORMER ADJUDICATION.

See "Judgment," § 2.

FRAUDULENT CONVEYANCES.

§ 1. Transfers and transactions invalid.
A sale of personalty, not followed by open and visible or notorious change of possession or ownership, is void, under the law of Illinois, as against creditors of the seller.
—Dooley v. Pease, 88 Fed. 446.....31 C. C. A. 582

GARNISHMENT.

§ 1. Persons and property subject to garnishment.
Defendant was summoned to answer touching its indebtedness to "the Central Vermont Railroad Company, a corporation established under the laws of the state of Vermont, and doing business under the name of the Ogdensburg Transit Company," and answered that it had no funds belonging to the defendant described, but that it had funds of the Central Vermont Railroad Company, and that the Ogdensburg Transit Company was an independent corporation. *Held*, that the defendant was properly charged as trustee.
—Boston & M. R. R. v. Wade, 87 Fed. 792.....31 C. C. A. 324

GRANTS.

Of public lands, see "Public Lands."

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HABEAS CORPUS.

Power of United States courts, see "Courts," § 7.

HEARING.

In equity, see "Equity," § 3.

HOMESTEAD.

Entry of public lands, see "Public Lands," § 1.

HORSE RAILROADS.

See "Street Railroads."

HUSBAND AND WIFE.

§ 1. Actions.

Under the law of Louisiana a wife cannot maintain an action in her own name against others than her husband, except for the purpose of recovering or protecting her paraphernal funds or property.

—Hart v. Bowen, 86 Fed. 877.....31 C. C. A. 31

Where a married woman deposits funds with a partnership as her separate paraphernal property, and they are recognized and treated as such by the firm and by the representatives of a deceased partner, her account being kept separate from her husband's, she may recover such funds in her own name, without proving their paraphernal character, defendants being estopped to deny the fact.

—Hart v. Bowen, 86 Fed. 877.....31 C. C. A. 31

INDICTMENT AND INFORMATION.

For forgery, see "Forgery," § 2.

INDORSEMENT.

Of notes, see "Bills and Notes," § 1.

INFRINGEMENT.

Of patent, see "Patents," §§ 4–6.

INJUNCTION.

To restrain enforcement of taxes, see "Taxation," § 7.
—— infringement of patent, see "Patents," § 5.
—— taking of land, see "Eminent Domain," § 2.

§ 1. Preliminary and interlocutory injunctions.

In a suit for specific performance of an alleged contract for the assignment of a large number of patents belonging to defendant, a preliminary injunction, involving the defendant in much inconvenience and possible loss, should not be granted, restraining him from selling or otherwise disposing of a list of patents enumerated as coming within the agreement, where one of the terms of the contract is so indefinite as to make it doubtful whether the court could enforce it, and where it is also doubt-

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ful whether some of the patents for which the injunction is sought are embraced within the terms of the contract.
—Miller v. Morley Finishing Mach. Co., 87 Fed. 621....31 C. C. A. 148

INSOLVENCY.

National banks, see "Banks and Banking," § 2.

INSPECTION.

Production of documents, see "Witnesses," § 1.

INSTRUCTIONS.

In civil actions, see "Trial," §§ 3–6.

INSURANCE.

§ 1. Insurance agents.
The agent of a life insurance company, authorized to close the contract by delivering the policy and collecting premiums, has, in general, implied authority to accept notes for the premiums.
—Mutual Life Ins. Co. v. Logan, 87 Fed. 637.....31 C. C. A. 172

§ 2. The contract in general.
Where a premium note has been negotiated by the agent of the company, and, on presentation by the assignee, allowed by the maker's executor as a claim against the estate, it is error to refuse to instruct that such action by the executor cannot bind the company, the issue being whether or not the contract was ever consummated.
—Mutual Life Ins. Co. v. Logan, 87 Fed. 637.....31 C. C. A. 172

While a policy which is ambiguous or of doubtful meaning should be construed most strongly against the insurer, yet, if its terms are clear and unambiguous, they are to be taken in their plain, ordinary sense, and no construction is necessary.
—Fred J. Kiesel & Co. v. Sun Ins. Office of London, 88 Fed. 243..... 31 C. C. A. 515

§ 3. Premiums.
A person dealing with an insurance company cannot be bound by a rule of the company forbidding the taking of premium notes, which is intended for the guidance of its agents, and of which he has no knowledge.
—Mutual Life Ins. Co. v. Logan, 87 Fed. 637.....31 C. C. A. 172

§ 4. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.
On the back of a premium receipt was printed, among other things, the following: "Provided satisfactory evidence and guaranty is furnished that the person whose life was insured is in good health and acceptable for new insurance, which guaranty shall be binding upon the insured and beneficiaries under said policy, the agent will receive a premium, and the insurance will be revived by the delivery of this receipt within 60 days from the time said premium became due." *Held*, that (applying the rule that contracts written on forms prepared by the insurer will, when ambiguous, be construed most favorably to the insured) the above provision was a mere direction by the company to its agents, so that the mere acceptance of such a receipt on the payment of an overdue premium would not imply a guaranty of good health on the part of the insured.
—Ætna Life Ins. Co. v. Smith, 88 Fed. 440.....31 C. C. A. 575

Where, in violation of the rules of the company, it is the practice of its agents to accept overdue premiums without requiring a guaranty that the insured is in good health, and this course of business is shown to be such

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that a reasonably prudent man, acting in the capacity of an executive officer, ought to have known of it, this is sufficient to warrant a finding that the executive officer of the company did in fact have knowledge of the practice.

—Ætna Life Ins. Co. v. Smith, 88 Fed. 440.....31 C. C. A. 575

§ 5. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

When the general agent of an insurance company has knowledge of frequent violations by a subagent of a rule of the company prohibiting the acceptance of notes for premiums, and makes no serious objection, the company must be deemed to have waived the application of the rule.

—Mutual Life Ins. Co. v. Logan, 87 Fed. 637.....31 C. C. A. 172

By knowingly permitting its agents to accept for a considerable period overdue premiums without taking health certificates, the company grants them authority so to do, and cannot avoid the effect thereof by showing that its printed instructions did not authorize the practice.

—Ætna Life Ins. Co. v. Smith, 88 Fed. 440.....31 C. C. A. 575

§ 6. Risks and causes of loss.

A policy on goods in a warehouse contained a clause which declared that "if a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." The building fell, and the goods were destroyed by fire; but whether the fall was caused by the fire, or by a gale of wind, was the matter in issue. Plaintiff requested a charge that, if the building or goods were on fire before the building fell, the company was liable, even though it would not have fallen but for the wind. *Held*, that the court properly rejected this request, and correctly charged that, if the fall was caused by the fire, the company was liable, but, if it resulted from some other cause, it was not.

—Fred J. Kiesel & Co. v. Sun Ins. Office of London, 88 Fed. 243..... 31 C. C. A. 515

Under an accident policy excepting from the risks "voluntary exposure to unnecessary danger," an accident is not within the exception unless the insured was aware of the danger he incurred, and purposely assumed the risks thereof.

—Ashenfelter v. Employers' Liability Assur. Corp., 87 Fed. 682..... 31 C. C. A. 196

§ 7. Extent of loss and liability of insurer.

Under a contract of insurance of the profits on a cargo of sugar "against total loss only" there is no actual total loss of profits where any part, however small, of the cargo, is saved, and reaches the owner in condition to earn a profit; and in such case no recovery can be had.

—Insurance Co. of North America v. Canada Sugar-Refining Co., 87 Fed. 491.....31 C. C. A. 65

In the United States the owner may abandon ship or cargo, and treat the loss as constructively total, when the damage exceeds 50 per cent. of the total value.

—Insurance Co. of North America v. Canada Sugar-Refining Co., 87 Fed. 491.....31 C. C. A. 65

Where insurance is upon the profits of a cargo, and not upon the cargo itself, a partial loss cannot be converted by abandonment into a constructive total loss.

—Insurance Co. of North America v. Canada Sugar-Refining Co., 87 Fed. 491.....31 C. C. A. 65

In cases of constructive total loss, abandonment is indispensable to recovery of insurance, except when it could not possibly be of benefit to the insurer.

—Insurance Co. of North America v. Canada Sugar-Refining Co., 87 Fed. 491.....31 C. C. A. 65

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§ 8. Actions on policies.
Whether a contractor, who was suffocated or burned to death by the ignition of a bucket of tar pitch which he was heating inside a tank for calking purposes, was aware of the danger arising from the character of that material, so as to bring him within the exception of "voluntary exposure to unnecessary danger," contained in his accident policy, *held*, on the evidence, to be a question which should have been submitted to the jury.
—Ashenfelter v. Employers' Liability Assur. Corp., 87 Fed. 682..... 31 C. C. A. 193

Declarations of insured as evidence in action on life policy, see "Evidence," § 2.

INTEREST.

See "Usury."

INTERNAL REVENUE.

Liability of sureties on bonds of officers, see "Principal and Surety."
Production of documents, see "Witnesses," § 1.

INTERVENTION.

In receivership proceedings, see "Receivers," § 1.

INVENTION.

See "Patents."

JOINDER.

Of parties, see "Parties."

JUDGES.

§ 1. Appointment.
In Texas, three out of four county commissioners have power to appoint a county judge to fill a vacancy, who will be a judge de facto, if not de jure.
—Marion County v. Coler, 88 Fed. 59.....31 C. C. A. 389

JUDGMENT.

Review, see "Appeal and Error."
Revival, see "Limitation of Actions."

§ 1. Collateral attack.
In a suit by a lessor railroad company to recover, under the provisions of the lease, taxes on the leased property which the lessor has been compelled to pay by the judgment of a court of competent jurisdiction, evidence as to the assessable value of the leased line is inadmissible as being, in effect, a collateral attack upon the assessment and upon the judgment in favor of the state for the amount of the taxes.
—United States Trust Co. v. Mercantile Trust Co., 88 Fed. 140..... 31 C. C. A. 427

§ 2. Conclusiveness of adjudication.
Where a judgment has been recovered against a county on its refunding bonds, and subsequently mandamus has been issued to compel the levy of a tax to pay such bonds, the question of their validity is concluded as between the same parties, and cannot be again raised in a subsequent suit.
—Marion County v. Coler, 88 Fed. 59.....31 C. C. A. 389

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JURISDICTION.

Particular courts, see "Courts."

JURY.

§ 1. Competency of jurors.

A juror who says he has an impression or opinion as to guilt or innocence of defendant, formed from newspapers and rumors, that it would require evidence to remove it, but that it would yield to evidence, and that he can and will give the defendant a fair and impartial trial according to the evidence that may be adduced before him, is competent.

—Gallot v. United States, 87 Fed. 446.....31 C. C. A. 44

LANDLORD AND TENANT.

Railroad leases, see "Railroads," §§ 1, 3.

LAND OFFICE.

See "Public Lands," § 3.

LETTERS PATENT.

For invention, see "Patents."

LEVEES.

§ 1. Levee districts and officers.

A railroad company agreed to perform certain work by a stipulated time unless it is "by reason of the elements, litigations, strikes, financial panics, epidemics, or any other cause unforeseen or beyond the control of said railroad company, its successors or assigns, hindered or delayed or otherwise prevented from properly prosecuting said work. In such case, time not being the essence of this contract, the date herein fixed for completion * * * will not be adhered to, but credit for the time so lost shall be given and allowed to said railroad company, its successors or assigns, and the time so lost shall be added to that herein required for the completion of" this contract. *Held* that, whether or not the company could ever be defaulted under the contract, Rev. Civ. Code La. art. 2765, providing that "the proprietor has a right to cancel at pleasure the bargain he has made, even in case the work has already been commenced, by paying the undertaker for the expense and labor already incurred, and such damages as the nature of the case may require," gave the contracting parties the right to declare the contract at an end at any time before its completion.

—Louisiana, A. & M. R. Co. v. Board of Levee Com'rs of Tensas Basin Levee Dist., 87 Fed. 594.....31 C. C. A. 121

Acts La. 1888, No. 77, § 2, gave the Tensas Basin Levee District all the state lands within the district to be used for the purpose of building a system of levees or other public improvement for the purpose of protecting the district from disastrous floods, and authorized the board to dispose of the lands in such manner as it should deem proper. Const. La. art. 56, prohibits the granting of the property of the state to private enterprise. The board contracted with a railway company for the building of a portion of its road in the form of a levee embankment, which the state engineer reported would be of great value to the district. *Held*, that the railway was, to the extent it would protect the district, a "public improvement," contemplated by the statute, though owned at its completion by private persons, and used for another purpose besides being a mere levee.

—Louisiana, A. & M. R. Co. v. Board of Levee Com'rs of Tensas Basin Levee Dist., 87 Fed. 594.....31 C. C. A. 121

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Defendant, an Arkansas railroad company, contracted with plaintiff, a Louisiana levee district, to build a portion of its railroad in Arkansas in the form of a levee embankment, of a certain height, which should serve the purpose of a levee as well as a railroad bed. The statutes of Arkansas forbid the building of railroad embankments which will interfere with the natural flow of the water, and the levee authorities in the district where the road was proposed to be built opposed it by legislation. *Held* that, the contract being impossible of performance, it should be rescinded.
—Louisiana, A. & M. R. Co. v. Board of Levee Com'rs of Tensas Basin Levee Dist., 87 Fed. 594.....31 C. C. A. 121

The constitution of Louisiana (article 214) authorizes the legislature to create levee districts, the boards of which shall have supervision of the levees in said districts. Article 216 gives power with the concurrence of the adjacent state or states to create levee districts composed of territory partly in the state and partly in adjacent states. Act No. 59, 1886, § 17, provides that the Tensas Basin District, in Louisiana, shall have the right to join with any levee district embracing the counties of Chicot and Desha, in Arkansas, for mutual protection. *Held*, that a contract by the Tensas Basin Levee District for the building of a levee in Chicot county, Ark., in opposition to the levee authorities of that state, was ultra vires and void.
—Louisiana, A. & M. R. Co. v. Board of Levee Com'rs of Tensas Basin Levee Dist., 87 Fed. 594.....31 C. C. A. 121

The act of July 3, 1886 (Sess. Laws, p. 96), of the Louisiana legislature, creating the Tensas Basin Levee Board, authorizing it to assess taxes, collect and receive funds, and hold and administer the same, and granting to it large tracts of public lands to be expended by it discreetly for the purpose of carrying out the purposes of the act, created not a merely ministerial and executory functionary, but a full-fledged municipal corporation, with large discretion as a fiduciary agent, and with full power to sue in regard to the trust imposed.
—Louisiana, A. & M. R. Co. v. Board of Levee Com'rs of Tensas Basin Levee Dist., 87 Fed. 594.....31 C. C. A. 121

LIENS.

See, also, "Maritime Liens."
Of attorney, see "Attorney and Client."
On railroads, see "Railroads," § 2.
Pledge, see "Pledges."

LIMITATION OF ACTIONS.

§ 1. Statutes of limitation—Construction in general.
"Title," as used in the Texas statute prescribing the three-years limitation, means a regular chain of transfer from or under the sovereignty of the soil; and "color of title" means a consecutive chain transfer down to the person in possession, without, however, being regular; as where one of the memorials or muniments is not registered or duly registered, or is only in writing, or such like defects as do not include a want of intrinsic fairness and honesty.
—Rice v. P. J. Willis & Bro., 87 Fed. 626; P. J. Willis & Bro. v. Oakes, Id.....31 C. C. A. 154

Act Ark. April 8, 1891, providing that no scire facias to revive a judgment "shall be issued but within ten years from the date of the rendition of the judgment," and that the act should take effect one year from its date, was intended to have a retrospective operation.
—Wrightman v. Boone County, 88 Fed. 435.....31 C. C. A. 570

LOCATION.

Of mining claims, see "Mines and Minerals."

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MALICIOUS PROSECUTION.

Arrest of passenger, see "Street Railroads."

MARINE INSURANCE.

See "Insurance."

MARITIME LIENS.

Review of decree enforcing lien, see "Appeal and Error," § 1.

§ 1. Nature, grounds, and subject-matter in general.

There can be no maritime lien against a vessel for breach of a contract of carriage where she never in fact entered on the performance thereof, and neither the libelants nor their baggage were ever received on board, or placed in the care or control of the master. 83 Fed. 222, affirmed.

—The Eugene, 87 Fed. 1001.....31 C. C. A. 345

Where one, under contract to purchase the entire catch of a schooner upon a proposed seal-hunting expedition, lent money to her owner and master upon the security of a mortgage on the schooner, and later advanced money for the wages of her crew, and for necessary repairs and supplies in a foreign port, *held*, that the proceeds of sale of the catch should be first applied to reimbursement of the latter advances, in so far as they were justified, rather than to payment of the loan.

—The H. C. Wahlberg, 87 Fed. 361; Lorentzen v. Schlehen, Id.....31 C. C. A. 6

MARRIED WOMEN.

See "Husband and Wife."

MASTER AND SERVANT.

Liability of vessel for injuries to stevedore's employé, see "Shipping," § 2.

§ 1. Master's liability for injuries to servant—Tools, machinery, appliances, and places for work.

No general duty rests upon a railway company to lay planks between the rails of its tracks; but if, for any reason, it does so, the work must be done and maintained in such a way as to be reasonably safe for persons rightfully upon the tracks and in the exercise of due care.

—Valley Ry. Co. v. Keegan, 87 Fed. 849.....31 C. C. A. 255

If defects similar to the one complained of existed at all similar places in the same railway yard. that fact should be considered by the jury as bearing upon the question whether an employé was chargeable with knowledge of such defect.

—Valley Ry. Co. v. Keegan, 87 Fed. 849.....31 C. C. A. 255

To justify the presumption that a railway employé knew of a dangerous defect in the roadbed, it must appear that the defect and its danger were obvious to one at all attentive.

—Valley Ry. Co. v. Keegan, 87 Fed. 849.....31 C. C. A. 255

§ 2. —— Fellow servants.

One of a gang of men engaged in clearing away a railway wreck is a fellow servant of the acting foreman of the gang, and cannot recover damages from the company for an injury received through the alleged negligence of such foreman.

—Flippin v. Kimball, 87 Fed. 258.....31 C. C. A. 282

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The foreman of a railway machine shop, with authority to give orders to the men working in his department, is the fellow servant of one of the men, there being a master mechanic over both, with authority to hire and discharge.
—Gaynon v. Durkee, 87 Fed. 302.....31 C. C. A. 306

§ 3. —— Risks assumed by servant.

See, also, "Shipping," § 2.

Where a railway company has accepted its street rights on condition that it will plank between its rails those portions of the public streets used by it, and one of its employés is injured by reason of an alleged defect in the planking, it is not reversible error to admit evidence of the condition upon which the company acquired its street rights.
—Valley Ry. Co. v. Keegan, 87 Fed. 849.....31 C. C. A. 255

Where a railway employé, whose duties for two months have been to couple cars in a railway yard a mile long and containing 22 tracks, was injured through catching his foot in a hole between the rails, which hole had existed for two months, the court is not, under the facts of this case, justified in holding, as a matter of law, that he had assumed the risk incident to such defect.
—Valley Ry. Co. v. Keegan, 87 Fed. 849.....31 C. C. A. 255

Before a court may presume, as a matter of law, that an employé assumes the risks incident to defective machinery or roadbed, it must appear that he accepted employment with actual knowledge of such defect, or continued in service after he knew or should have known of the danger.
—Valley Ry. Co. v. Keegan, 87 Fed. 849.....31 C. C. A. 255

§ 4. —— Contributory negligence of servant.

The rule requiring a traveler on a highway to stop, look, and listen before crossing a railroad track, is not the criterion by which to determine the degree of care required by an employé about to cross a private railway operated as part of his employer's rolling-mill plant. In such case the employer is bound not to expose its servant, conducting its business, to unnecessary peril against which it might have guarded with reasonable diligence; and the servant has a right to assume that his employer will not subject him to needless danger. The servant is therefore bound only to observe reasonable care to avoid danger which is obvious, or which is known to him, or of which he might have acquired knowledge by the exercise of proper attention.
—Weiss v. Bethlehem Iron Co., 88 Fed. 23.....31 C. C. A. 363

MASTERS IN CHANCERY.

See "Equity," § 4.

MINES AND MINERALS.

Jurisdiction of action relating to, see "Courts," § 2.
Suits to determine adverse claims, see "Action."

§ 1. Public mineral lands—Location and acquisition of claims.

Seams containing mineral-bearing earth and rock, discovered on a claim before its location, were similar to seams that had induced other miners to locate claims in the same district, and which by development had proved to be a part of a well-defined lode or vein containing ore of great value. *Held* a sufficient compliance with Rev. St. § 2320, requiring the discovery of a lode or vein within the limits of a claim before a valid location thereof can be made.
—Shoshone Min. Co. v. Rutter, 87 Fed. 801.....31 C. C. A. 223

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A locator may relocate his mining claim, including additional vacant ground unclaimed by others, under a different name, and convey it by the designation of the last name.
—Shoshone Min. Co. v. Rutter, 87 Fed. 801.....31 C. C. A. 223

MORTGAGES.

Of railroads, see "Railroads," § 2.
Parol or extrinsic evidence, see "Evidence," § 3.
Rights of bondholders, see "Replevin."

§ 1. Recording and registration.
Where a mortgage describes land as "thirty acres in" a certain quarter section, it is not necessary that such land should be laid off in the form of a square, one angle of which conforms to the southwest angle of the quarter section; and, where the only land in such quarter section belonging to the mortgagor is 30 acres lying south of a certain creek, the judgment creditors of the mortgagor will be charged, by the record of the mortgage, with notice of the mortgagee's interest in such land.
—Vanvalkenberg v. American Freehold Land Mortgage Co., 87 Fed. 617.....31 C. C. A. 145

§ 2. Construction and operation.
Where land is conveyed by a mortgage, by uncertain terms of description, it is not indispensable to the identification of the land that the mortgagee should have been placed in actual possession.
—Vanvalkenberg v. American Freehold Land Mortgage Co., 87 Fed. 617.....31 C. C. A. 145

§ 3. Foreclosure by action—Parties.
A holder of bonds secured by a general mortgage to a trustee for the benefit of all the bondholders, although the right to sue belongs to him individually, may not bring a suit to foreclose the mortgage either for the interest or the principal due, without alleging that the trustee has been requested to bring the suit, and has refused, or without showing some other reason why the trustee may not represent him in the suit.
—General Electric Co. v. La Grande Edison Electric Co., 87 Fed. 590.. 31 C. C. A. 118

§ 4. —— Sale.
Where a mortgage is foreclosed in equity, the court is not bound to decree a sale in strict accordance with the terms prescribed in the mortgage for the execution of the power of sale therein contained, but should exercise a sound discretion, having due regard to the interest of all parties.
—Low v. Blackford, 87 Fed. 392.....31 C. C. A. 15

§ 5. —— Distribution of proceeds.
A mortgage and the bonds and coupons secured thereby are to be construed as one contract, and provisions in the mortgage as to the method of distribution of the proceeds in case of foreclosure sale, although not found in the bonds, will bind the bondholders where there is nothing in the bonds inconsistent therewith.
—Low v. Blackford, 87 Fed. 392.....31 C. C. A. 15

MOTIONS.

In relation to pleading, see "Equity," §§ 1, 2.

MUNICIPAL CORPORATIONS.

Street railroads, see "Street Railroads."

§ 1. Public improvements—Contracts.
A municipal corporation which has enjoyed the fruits of a contract fairly made cannot, when called to account, deny the corporate power to make it.
—Warner v. City of New Orleans, 87 Fed. 829.....31 C. C. A. 238

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§ 2. —— Assessments for benefits, and special taxes.
A city is liable for special assessments against itself for local benefits to its streets and other public places, regardless of the rule that public property is exempt from taxation.
—Warner v. City of New Orleans, 87 Fed. 829.....31 C. C. A. 238

A city, by drawing warrants against a fund composed largely of assessments and judgments against itself as quasi owner of the streets and public squares, etc., is estopped to deny the validity of those assessments and judgments.
—Warner v. City of New Orleans, 87 Fed. 829.....31 C. C. A. 238

§ 3. Torts—Defects or obstructions in streets or other public ways.
A city, by authorizing the erection by an electric light company of poles and wires in the streets, does not become chargeable with the duty of inspecting such structures, and maintaining them in a safe condition for the protection of persons using the streets for travel, to the same extent as though it had itself erected them; but its duty extends only to a general supervision over the light company, and it is liable for injuries caused by defects only when it has been negligent, after actual or constructive notice of such defects. Thayer, Circuit Judge, dissenting.
—City of Denver v. Sherret, 88 Fed. 226.....31 C. C. A. 498

§ 4. Fiscal management—Power to incur indebtedness and expenditures.
A charter provision authorizing a city situated on one bank of a river to issue bonds to aid "in defraying the cost and expense of constructing a combination railroad and wagon bridge" is sufficient authority for issuing bonds to aid in building such a bridge across the river in question, though part of the bridge will necessarily be outside the corporate limits.
—City of South St. Paul v. Lamprecht Bros. Co., 88 Fed. 449.....
31 C. C. A. 585

§ 5. —— Warrants and payments.
The city of New Orleans purchased the drainage system then in process of construction from the contractor; paying therefor in warrants, and covenanting not to obstruct or impede, but to facilitate by all lawful means, the collection and application of the drainage assessments to the payment of the warrants. The city abandoned the work, and the supreme court of the state decided that the assessments were not enforceable, because the abandonment of the work had rendered it a detriment, rather than a benefit, to the lands. Suit was brought against the city by a holder of the purchase warrants. *Held* that, under the maxim "that equity looks upon that as done which ought to have been done," the city must be treated as having done whatever was necessary to render the assessments available, and therefore as liable to account for the fund as if actually collected and in hand.
—Warner v. City of New Orleans, 87 Fed. 829.....31 C. C. A. 238

By an amendment to the Louisiana constitution, the city of New Orleans was prohibited from increasing its debt, except that it might issue drainage warrants under a certain contract then in process of completion. *Held*, that a purchase of works being built, and the issuance of warrants for the price, were within the exception.
—Warner v. City of New Orleans, 87 Fed. 829.....31 C. C. A. 238

A city bought property, and issued warrants against a fund in payment therefor, and undertook to collect the judgments and assessments belonging to such fund, and apply them to pay the warrants. *Held*, that the city could not avail itself of the plea of the statute of limitations against the holders of the warrants, based on the fact that the city had allowed the judgments to outlaw.
—Warner v. City of New Orleans, 87 Fed. 829.....31 C. C. A. 238

By Act La. No. 30, 1871, the board of administrators of the city of New Orleans was authorized to make and collect drainage assessments, and hold the amount collected in trust for the payment of warrants issued for drainage work done by parties to whom the whole drainage work was by said

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act intrusted. June 7, 1876, by authority of Act No. 16, 1876, the city purchased the drainage franchise and property for $300,000, and issued drainage warrants therefor. In 1891 a receiver was appointed by the circuit court, to whom the city transferred the assets and property of the drainage fund. *Held*, that holders of warrants issued for such purchase are not restricted for their payment to funds in the hands of the receiver, but are entitled to a judgment against the city, to be paid out of the drainage taxes collected by it.

—Wilder v. City of New Orleans, 87 Fed. 843.....31 C. C. A. 249

§ 6. —— Bonds.

Under a charter provision authorizing the issuance of bonds "payable at such times not to exceed 30 years" as may be determined, the bonds are not void when they run 30 years from the time they first begin to bear interest, though this is more than 30 years from the time they were executed.

—City of South St. Paul v. Lamprecht Bros. Co., 88 Fed. 449.....
31 C. C. A. 585

A purchaser in the open market of municipal bonds purporting to have been issued to aid in constructing a bridge across a navigable river is entitled to presume that the secretary of war had approved the proposed location of the bridge.

—City of South St. Paul v. Lamprecht Bros. Co., 88 Fed. 449.....
31 C. C. A. 585

The issuance of bonds containing the representation that they are "authorized by" a certain act of the legislature estops the municipality from tendering proof, as against a bona fide purchaser, that they were not so authorized, and that certain requisite preliminary steps were not in fact taken.

—City of South St. Paul v. Lamprecht Bros. Co., 88 Fed. 449.....
31 C. C. A. 585

NAMES.

See "Trade-Marks and Trade-Names."

NATIONAL BANKS.

See "Banks and Banking," § 2.

NAVIGABLE WATERS.

See "Wharves."

NEGLIGENCE.

In operation of railroads, see "Railroads," § 4.
In production and use of electricity, see "Electricity."
Liability of vessel, see "Shipping," § 2.
Of carriers, see "Carriers," § 1.
Of employers, see "Master and Servant," §§ 1–4.
Of municipal corporations, see "Municipal Corporations," § 8.
Of servant, see "Master and Servant," § 4.
Of tugs, see "Towage," §§ 2, 3.

§ 1. Contributory negligence—Comparative negligence.

Contributory negligence of the party injured will not defeat an action, if the defendant might, with reasonable care, have avoided the consequences of such negligence.

—Baltimore & O. R. Co. v. Hellenthal, 88 Fed. 116....31 C. C. A. 414

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NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NOTICE.

By record, see "Mortgages," § 1.
Of defects constituting negligence, see "Corporations," § 5.

OFFICERS.

Bonds of officers, see "Principal and Surety."
Of corporation, see "Corporations," § 5.
Of levee district, see "Levees."
United States attorneys, see "District and Prosecuting Attorneys."

OLEOMARGARINE.

Regulation of use of, see "Food."

OPINION EVIDENCE.

See "Evidence," § 4.

PAROL EVIDENCE.

See "Evidence," § 3.

PARTIES.

To appeal, see "Appeal and Error," § 2.
To foreclosure suits, see "Mortgages," § 3.

§ 1. Defendants—Joinder.
Where an action was brought against a city and an electric light company as jointly liable for an injury to plaintiff, and no objection to the joinder was taken by motion or demurrer, but defendants both answered, a motion made, when the cause came on for trial, to require plaintiff to elect which defendant she would proceed against, was, in effect, a motion for separate trials; and, being addressed to the discretion of the court, its ruling thereon is not reviewable.
—City of Denver v. Sherret, 88 Fed. 226.....31 C. C. A. 499

PARTNERSHIP.

§ 1. Death of partner, and surviving partner.
For 10 years an employé worked for a partnership without the amount of his compensation having been fixed, being permitted to draw what money he needed, which was charged to his account. At the end of that time the senior partner died, the business being continued in the firm name by the surviving partner, who was a son and heir of the deceased partner, and the remaining heirs. Afterwards, on a settlement made with the surviving partner and other of the heirs and the employé, the past salary of the latter was agreed upon, and the amount credited to his account on the books of the firm. *Held*, that such settlement was binding on the firm and the representatives of the deceased partner, unless set aside in a direct proceeding for that purpose on the ground of error, mistake, or fraud.
—Hart v. Bowen, 86 Fed. 877.....31 C. C. A. 31

In California, where the law gives to a surviving partner absolute power of the control and disposition of the assets of the partnership (Code Civ.

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Proc. § 1585), the heirs of a deceased partner have no such interest in the partnership property as entitles them or their judgment creditors to redeem such property from a sale under a mortgage. 79 Fed. 861, affirmed.
—McGorray v. O'Connor, 87 Fed. 586.....31 C. C. A. 114

PASSENGERS.

See "Carriers."

PATENTS.

Injunction against sale of patents, see "Injunction."
Jurisdiction of suits for infringements, see "Courts," § 3.

§ 1. Patentability—Invention.

Prophetical suggestions in a foreign patent of what can be done, when no one has ever tested, by actual and hard experience and under the stress of competition, the truth of the suggestions, or the practical difficulties in the way of their accomplishment, or even whether the suggestions are feasible, are not to be accepted as showing that a subsequent patent, which has already been sustained by the courts as a meritorious one, is without actual invention.
—Westinghouse Air-Brake Co. v. Great Northern Ry. Co., 88 Fed. 258.....31 C. C. A. 525

The substitution of rounded corners in the panels of metallic ceilings for the sharp angles previously used in like panels involves no invention, it appearing that the advantage of making rounded corners in other articles constructed from sheet metals than ceiling panels was well understood by artisans.
—Capital Sheet-Metal Co. v. Kinnear & Gager Co., 87 Fed. 333..... 31 C. C. A. 3

The granting of a subsequent patent for a similar machine or device affords a presumption of a patentable difference between the two.
—St. Louis Car-Coupler Co. v. National Malleable Castings Co., 87 Fed. 885.....31 C. C. A. 265

To sustain a patent for a combination each element of which is old, considered separately, there must be some peculiar combination of these elements, producing new and useful results.
—St. Louis Car-Coupler Co. v. National Malleable Castings Co., 87 Fed. 885.....31 C. C. A. 265

§ 2. —— Novelty.

Novelty is not negatived by a prior accidental production of the same thing, when the operator does not recognize the means by which the accidental result is accomplished, and no knowledge of them, or of the method of their employment, is derived from it by any one.
—Wickelman v. A. B. Dick Co., 88 Fed. 264.....31 C. C. A. 530

§ 3. Construction and operation of letters patent.

Where all the claims are for combinations only, this implies that all the rest is old, or, at least, that the patentee does not claim the elements separately.
—St. Louis Car-Coupler Co. v. National Malleable Castings Co., 87 Fed. 885.....31 C. C. A. 265

In a claim for the combination with a wheeled vehicle of an electrodynamic motor flexibly supported from such vehicle, "and centered upon the driving axle thereof," the use of the word "centered" does not require a perfectly rigid union of axle and motor, but only that the center of movement of the motor shall always be the car axle.
—Union Ry. Co. v. Sprague Electric Railway & Motor Co., 88 Fed. 82.. 31 C. C. A. 391

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§ 4. Infringement—What constitutes infringement.

In a patent for an electric railway motor, a claim describing the field magnet of the motor as "sleeved upon an axle" of the vehicle at one end is infringed by a construction in which flexible extensions from the field magnet are journaled upon the axle.

—Union Ry. Co. v. Sprague Electric Railway & Motor Co., 88 Fed. 82.. 31 C. C. A. 391

§ 5. —— Suits in equity.

When an appellate court declares a patent valid and infringed, reverses the decree below, and remands the cause for further proceedings not inconsistent with its opinion, it does not follow as a matter of course that an injunction pendente lite shall issue; but, in the absence of any directions in regard thereto in the opinion or mandate, the matter rests in the discretion of the trial judge.

—In re Chicago Sugar-Refining Co., 87 Fed. 750.....31 C. C. A. 221

A railroad company continuing to use infringing air brakes on large numbers of its cars for 3½ years after notice of an adjudication by a circuit court of appeals sustaining the patent, and declaring infringement, cannot complain, on the ground of hardship, of a preliminary injunction, which provides for a gradual removal of the infringing brakes.

—Westinghouse Air-Brake Co. v. Great Northern Ry. Co., 88 Fed. 258.....31 C. C. A. 525

A decision in interference proceedings cannot be invoked, as against strangers to it, as a ground for the issuance of a preliminary injunction.

—Wilson v. Consolidated Store-Service Co., 88 Fed. 286..31 C. C. A. 533

Sometimes a preliminary injunction may issue in a suit on a patent when the validity of the patent is clear, though it has not been sustained by a prior adjudication or public acquiescence.

—Wilson v. Consolidated Store-Service Co., 88 Fed. 286..31 C. C. A. 533

With reference to a prior judgment or general acquiescence, there must be the same freedom from doubt, in behalf of a party applying for a temporary injunction, as if the question were one of validity alone. And a judgment rendered in a cause which, by reason of an adjustment among the parties, became practically a mere case before it was judicially passed upon, is not sufficient ground for granting such an injunction.

—Wilson v. Consolidated Store-Service Co., 88 Fed. 286..31 C. C. A. 533

§ 6. Decisions on the validity, construction, and infringement of particular patents.

In Putnam's patent, No. 232,207, for breaking-carts, the effect of the withdrawal of the original specifications after the application was rejected is to limit his patent to the specific invention described in his amended specifications, to wit, the construction of carts where the central portion of the straps extends "beneath the axle." 80 Fed. 109, affirmed.

—Truman v. Holmes, 87 Fed. 742.....31 C. C. A. 215

The Sprague patent, No. 324,892, for an improved electric railway motor, covers, not a pioneer or broad invention, but a clearly-defined one, the gist of which consists in the utilization of the frame of the motor itself with the necessary extension, and the centering of the motor on the driven axle by extension pieces from the field magnet at one end, and in its flexible suspension, at the other end, to the car track, the armature being carried rigidly by the field magnet. Claims 2 and 6 of this patent are infringed by a motor made in accordance with the Short patent, No. 546,560, and claim 9 is not infringed.

—Union Ry. Co. v. Sprague Electric Railway & Motor Co., 88 Fed. 82.. 31 C. C. A. 391

An order granting a preliminary injunction against infringement of the Osgood patents, Nos. 357,851 and 293,192, for a cash carrier, or store-service apparatus, reversed on appeal because the validity of the patent is doubtful, and because there was no clear adjudication sustaining the patent after bona fide contest, and no sufficient proof of public acquiescence.

—Wilson v. Consolidated Store-Service Co., 88 Fed. 286..31 C. C. A. 533

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The Westinghouse patent, No. 376,837, for improvements in fluid pressure brake mechanism, *held* valid and infringed as to claims 1, 2, and 3.
—Westinghouse Air-Brake Co. v. Great Northern Ry. Co., 88 Fed. 258.....31 C. C. A. 525

The Broderick patent, No. 377,706, for a coated paper sheet for stencils, *held* to cover a novel and meritorious invention, and also *held* infringed.
—Wickelman v. A. B. Dick Co., 88 Fed. 264.....31 C. C. A. 530

The Kinnear patent, No. 383,285, for improvements in metallic ceilings, is void for want of invention as to claim 2, in which the only feature of novelty is the making of the panels with round corners. 81 Fed. 491, reversed.
—Capital Sheet-Metal Co. v. Kinnear & Gager Co., 87 Fed. 333..... 31 C. C. A. 3

The Lorraine and Aubin reissue, No. 10,941 (original, No. 369,195), for an automatic car coupler, which is intended as an improvement on couplers of the Janney or Master Car Builders' type, is only sustainable, if at all, by confining it to the precise form shown in the specifications and delineated in the drawings, and is not infringed by a coupler made in accordance with the Tower patent, No. 541,446. 81 Fed. 706, affirmed.
—St. Louis Car-Coupler Co. v. National Malleable Castings Co., 87 Fed. 885.....31 C. C. A. 265

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PERSONAL INJURIES.

Damages for, see "Damages."
Incident to production or use of electricity, see "Electricity."
To employé, see "Master and Servant," §§ 1-4; "Shipping," § 2.
To passengers, see "Carriers," § 1.
To persons on board tow, see "Towage," § 3.
—— on or near railroad track, see "Railroads," § 4.
To stevedore's employés, see "Shipping," § 2.
To traveler on highway, see "Municipal Corporations," § 3.

PIERS.

See "Wharves."

PLEADING.

Account stated, see "Account Stated."
In equity, see "Equity," §§ 1, 2.

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§ 1. Plea or answer.
Under the Colorado Code, the plea of the general issue, as known at common law, is abolished, and the answer must contain a denial of each material allegation intended to be denied, and every material allegation not controverted is taken as true.
—McKenzie v. Poorman Silver Mines of Colorado, 88 Fed. 111..... 31 C. C. A. 409

A plea that "plaintiff is a person non compos mentis and insane, and cannot maintain the said above-entitled suit," is not good.
—Florida C. & P. R. Co. v. Bell, 87 Fed. 369.....31 C. C. A. 9

The jurisdiction of a court does not depend on defendant's answer, and cannot be taken away by it.
—Florida C. & P. R. Co. v. Bell, 87 Fed. 369.....31 C. C. A. 9

§ 2. Proof.
After the court has been called upon to hear and pass upon testimony, it will adjudicate on the facts shown, though not strictly within the pleadings, as it is well settled in Louisiana that parties are bound by the evidence introduced by them on a material point, though not strictly presented by the pleadings.
—Yazoo & M. V. R. Co. v. Wagner, 87 Fed. 855.....31 C. C. A. 261

PLEDGES.

By corporations, see "Corporations," § 6.

§ 1. Enforcement by pledgee—Sale of property.
A trust company, which was trustee under a railroad first mortgage, afterwards, in its individual capacity, made a loan to the railroad company, secured by a pledge of its second mortgage bonds. *Held*, that the trust company's right to sell the collateral according to the terms of the pledge was not affected by the fact that it had already commenced a foreclosure suit as trustee under the first mortgage, and that a receiver had been appointed in that suit, or by the fact that it had also become the owner of the majority of the first mortgage bonds.
—Guaranty Trust Co. of New York v. Galveston City R. Co., 87 Fed. 813.....31 C. C. A. 235

A sale of collateral by the pledgee pursuant to the terms of the pledge conveys the entire interest, so that the pledgor is not entitled, as against the purchaser, to a surplus realized by him beyond the amount for which the pledge was made.
—McDougall v. Hazelton Tripod-Boiler Co., 88 Fed. 217; Hazelton Tripod-Boiler Co. v. McDougall, Id.....31 C. C. A. 487

A pledgee, authorized by the terms of the pledge to sell the securities without notice to the pledgor, is not bound to notify the pledgor of the grounds on which he exercises the power of sale.
—McDougall v. Hazelton Tripod-Boiler Co., 88 Fed. 217; Hazelton Tripod-Boiler Co. v. McDougall, Id.....31 C. C. A. 487

A pledgor cannot object that a sale of the thing pledged by one acting as agent of the pledgee was unauthorized by the latter, when it appears that such agent acted upon an assumption of authority, and that the pledgee was aware of the sale, and never made any objection to it.
—McDougall v. Hazelton Tripod-Boiler Co., 88 Fed. 217; Hazelton Tripod-Boiler Co. v. McDougall, Id.....31 C. C. A. 487

§ 2. —— Disposition of proceeds.
A corporation, claiming money under a contract, after instituting suit thereon, pledged the contract with a third person as collateral, but continued to prosecute the suit in its own name, with a view of realizing for itself a surplus above the amount of the debt secured by the pledge. After it obtained decree, one who had purchased the contract from the pledgee under his power of sale intervened, and claimed the proceeds of

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the decree. *Held*, that the pledgor was not entitled to be repaid out of the fund the expenses incurred in prosecuting the suit.
—McDougall v. Hazelton Tripod-Boiler Co., 88 Fed. 217; Hazelton Tripod-Boiler Co. v. McDougall, Id.....31 C. C. A. 487

POST OFFICE.

Evidence on trial for mailing lewd and lascivious letters, see "Criminal Law," § 1.

PRINCIPAL AND AGENT.

See, also, "Attorney and Client."
Insurance agents, see "Insurance," § 1.

§ 1. Rights and liabilities as to third persons—Undisclosed agency.
Plaintiff's assignor, by contract under seal, sold land to an agent, who contracted in his own name without disclosing his principal. *Held* that, on default of payments, the plaintiff had no right of action against the principal afterwards discovered.
—Badger Silver Min. Co. v. Drake, 88 Fed. 48.....31 C. C. A. 378

PRINCIPAL AND SURETY.

§ 1. Discharge of surety.
Mere neglect of an internal revenue collector to comply with the laws and regulations requiring him to frequently examine and verify the accounts of his deputy, and see that he faithfully discharges his duty, will not release the sureties on the deputy's official bond from liability for defalcations, which a strict performance of these duties might have prevented.
—Williams v. Lyman, 88 Fed. 237.....31 C. C. A. 511

Neither the negligence nor failure of an obligee in an official bond, in the discharge of some duty to a third party, nor his negligence or laches in enforcing a compliance with its condition, will release the sureties. Nothing less than the breach of a covenant which the obligee has made, or connivance at the principal's breach of the bond, or knowledge of such breach, and a continuance of his employment without communicating the fact to his sureties, or such a willful shutting of the eyes to the evidences of the breach as warrants the inference of connivance, will have that effect.
—Williams v. Lyman, 88 Fed. 237.....31 C. C. A. 511

PROMISSORY NOTES.

See "Bills and Notes."

PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," §§ 1, 2.

PUBLIC LANDS.

See, also, "Mines and Minerals."
Jurisdiction of action relating to, see "Courts," § 2.
Taxation, see "Taxation," § 2.

§ 1. Survey and disposal of lands of United States—Entries, sales, and possessory rights.
When, on the relinquishment of a homestead entry, the land is, and for some time past has been, in the possession of another, who is a bona

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fide settler, his rights as such immediately attach to the exclusion of a third person, who procures the relinquishment to be made, and who simultaneously with the relinquishment tenders an application for entry of the lands, and immediately enters thereon and makes improvements.
—Moss v. Dowman, 88 Fed. 181.....31 C. C. A. 447

No valid pre-emption can be made of lands which have been withdrawn from settlement and sale by the officers of the land department; and even if the order of withdrawal is subsequently canceled, and a patent then issues, no title passes, for the acts of the settler were in violation of law, and void.
—Southern Pac. R. Co. v. Groeck, 87 Fed. 970.....31 C. C. A. 334

§ 2. —— Grants in aid of railroads.
Act July 2, 1864, § 3, makes the grant to the Northern Pacific Railroad Company definite, taking effect from the date of the act, when the line of road is definitely fixed by the company, and a plat thereof filed in the general land office. *Held* that, when the company thus signified its location of any portion of its line, it was concluded thereby, and, if it afterwards constructed its road on a different line, it must procure a right of way by purchase or condemnation proceedings, where private rights had intervened.
—Northern Pac. R. Co. v. Murray, 87 Fed. 648.....31 C. C. A. 183

The act of July 27, 1866, § 3, granting lands to aid in the construction of the Southern Pacific Railroad Company, of itself operated to withdraw from settlement the lands lying within the indemnity as well as the grant limits, from the date of filing of the map of the general route; and the secretary of the interior had no power to affect the grantee's rights, or to authorize a pre-emption settlement on the lands, by subsequently canceling his order withdrawing the lands from settlement.
—Southern Pac. R. Co. v. Groeck, 87 Fed. 970.....31 C. C. A. 334

Delay in constructing the road, beyond the time limited by law, gives the secretary of the interior no authority to reopen the lands to settlement by canceling his order of withdrawal. A forfeiture of the railroad grant can be declared by congress alone.
—Southern Pac. R. Co. v. Groeck, 87 Fed. 970.....31 C. C. A. 334

Where the granting act of itself operates to withdraw from settlement lands lying within the indemnity limits as well as within the grant limits (as in the case of the grant of 1866 to the Southern Pacific Railroad Company), laches is not imputable to the grantee, because of delay in completing its road and making its indemnity selections, in a contest with one who has attempted to make a pre-emption entry after the filing of the map of general route.
—Southern Pac. R. Co. v. Groeck, 87 Fed. 970.....31 C. C. A. 334

§ 3. —— Proceedings in land office.
It is only when it is made plain that the officers of the land department have, by a mistake of law, deprived a party of land to which he is rightfully entitled, that a court of equity is justified in setting aside the action of the department.
—Moss v. Dowman, 88 Fed. 181.....31 C. C. A. 447

§ 4. Spanish grants.
The survey of a Spanish grant, as recorded in 1851, contained 18,121.22 acres, and was approved by the surveyor general in 1871. In the chancery book was found what purported to be a decree entered in 1851, confirming the surveyor's report to the extent of 16,000 acres. The decree was not signed by the judge, nor was it his practice to sign decrees, but the decree purported to be entered three days before the answer praying it was filed. *Held*, that the decree was not final so as to bar a further survey and confirmation.
—Robertson v. Sewell, 87 Fed. 536; Sewell v. Robertson, Id.....
31 C. C. A. 107

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RAILROADS.

See, also, "Street Railroads."
Carriage of passengers, see "Carriers."
Compensation for land taken, see "Eminent Domain," § 1.
Duties and liabilities to employés, see "Master and Servant."
Grants in aid of, see "Public Lands," § 2.
Taxation, see "Taxation," §§ 4–7.

§ 1. Sales and leases.

Where a lessee railroad company is bound by the provisions of the lease to repay to the lessor taxes paid by it on the leased property, and, upon the subsequent increase of the assessment of the leased line, together with other roads of the lessor, the lessee, through its counsel, assents to a contest thereof by the lessor, which contest results in favor of the state, the lessee company, and its receiver subsequently appointed, are liable for their due proportion of the attorney's fees, costs, and interest incurred in the contest. 80 Fed. 18, affirmed.

—United States Trust Co. v. Mercantile Trust Co., 88 Fed. 140..... 31 C. C. A. 427

One railroad company, by written contract, agreed to sell to another, and the latter agreed to buy, part of its road at a fixed price, but the contract recited that, owing to mortgages on the property, the vendor could not then make a clear title; and it was therefore further agreed that in the meantime it should lease the road to the purchaser at a fixed rental per mile. The provisions in relation to the sale and to the lease were kept distinct throughout the instrument, and a right was reserved to the lessor to reenter for nonpayment of rent, etc. *Held*, that, prior to the time when title could be transferred, the relations of the parties were those of lessor and lessee, and that, even if the contract of sale was ultra vires, the lease was valid.

—United States Trust Co. v. Mercantile Trust Co., 88 Fed. 140..... 31 C. C. A. 427

§ 2. Liens and mortgages—Foreclosure.

Where a single mortgage, given by a railway company to secure three series of bonds, each of which constituted a first lien upon one of the three divisions of the road, and a second lien upon the other two, was foreclosed in equity, *held*, that the three divisions should not be sold separately, nor should the property be offered both in separate divisions and as an entirety, and the most advantageous bid accepted; but the entire property should be sold as an entirety, and the proceeds apportioned among the bondholders of the three classes according to the relative value of the three divisions as found from the evidence. 82 Fed. 344, affirmed.

—Low v. Blackford, 87 Fed. 392.....31 C. C. A. 15

§ 3. Receivers.

A claim against a railroad company which is in the hands of a receiver under foreclosure proceedings, for rent of track privileges accruing prior to the appointment of the receiver, is not entitled, as against the mortgage bondholders, to priority of payment out of the proceeds of sale, where no special equities are shown, and it appears that the lessor relied for payment upon the general credit of the lessee and its sublessee.

—Louisville & N. R. Co. v. Central Trust Co., 87 Fed. 500..... 31 C. C. A. 89

Track rentals are not in general recognized as of the kind of claims which may become entitled, on the appointment of a receiver, to priority over the mortgage bonds.

—Louisville & N. R. Co. v. Central Trust Co., 87 Fed. 500..... 31 C. C. A. 89

Where one of the conditions on which receivers are appointed in railroad foreclosure proceedings is that they shall pay all claims for taxes, and

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the receivers adopt the provisions of a lease by continuing in the possession and operation of the leased line, a claim for taxes which the lessor company has been compelled to pay, and which, by the terms of the lease, the lessee is bound to refund, becomes entitled to priority over the mortgage debt.

—United States Trust Co. v. Mercantile Trust Co., 88 Fed. 140..... 31 C. C. A. 427

A railroad company leased part of its road to another company, the lessee agreeing to pay all taxes assessed against the leased property. Under the local laws taxes on the leased line were assessed to the lessor, as owner, in the same manner as the taxes upon the part of its road not leased; and in the course of business the lessor paid all the taxes and then rendered bills to the lessee for the proportion due from the leased line. The assessment of all the property of the lessor, including the leased line, having been raised, it contested the same, and after long litigation the assessment was sustained. In the meantime receivers had been appointed for the lessee company, and they had remained in possession of the leased road, and had raised money to pay other taxes thereon by issuing receivers' certificates. *Held*, that their action was an adoption of the lease, and they were liable, according to its terms, to repay to the lessor their proper proportion of the judgment for the contested taxes.

—United States Trust Co. v. Mercantile Trust Co., 88 Fed. 140..... 31 C. C. A. 427

§ 4. Operation—Injuries to licensees or trespassers in general.

One traversing a railway platform merely to deliver an article sold by him to persons on a train is entitled to no higher degree of care on the part of the railroad company with respect to keeping its platform in good condition than is due from a municipality to the public in respect to its streets, and hence it is not liable for injury resulting from mere slipperiness due to sleet and snow recently fallen.

—Clark v. Howard, 88 Fed. 199.....31 C. C. A. 454

§ 5. —— Injuries to persons on or near tracks.

Where there is conflicting evidence as to the distance at which an engineer on a locomotive saw a child on the track and as to the distance within which the train could be stopped, the question as to whether the engineer was negligent in not stopping the train in time is for the jury.

—Baltimore & O. R. Co. v. Hellenthal, 88 Fed. 116....31 C. C. A. 414

RECEIVERS.

Of railroad companies, see "Railroads," § 8.

§ 1. Actions.

Where a complainant, instead of proceeding at law, under 25 Stat. 433, against a receiver appointed by a federal court, intervenes in the receivership proceeding on the chancery side, he waives his right to trial by jury; and, if the court submits an issue of fact to a jury, the verdict and findings are merely advisory.

—Flippin v. Kimball, 87 Fed. 258.....31 C. C. A. 282

The appointment of a receiver of the property of a debtor does not abate personal actions pending against the debtor, and, as to such an action, the receiver has no status in court until made a party thereto on his own application; the plaintiff having a right to proceed to final judgment without him.

—Wilder v. City of New Orleans, 87 Fed. 843.....31 C. C. A. 249

§ 2. Accounting and compensation.

Traveling expenses of a receiver of a railroad, incurred in going to and from his residence to the railroad property, and elsewhere about the country, in the interests of the property, are properly allowed.

—Northern Alabama Ry. Co. v. Hopkins, 87 Fed. 505; Hopkins v. Northern Alabama Ry. Co., Id.....31 C. C. A. 94

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The receiver of a railroad, at the instigation of the bondholders, made several trips to Europe, in an effort to get the property out of its embarrassed financial condition. *Held*, that the bondholders were estopped to complain of the allowance of the receiver's expenses for such trips out of the proceeds of the sale of the property under a decree of foreclosure.

—Northern Alabama Ry. Co. v. Hopkins, 87 Fed. 505; Hopkins v. Northern Alabama Ry. Co., Id.....31 C. C. A. 94

And the purchasers under the sale had no interest to contest the allowance of such expenses.

—Northern Alabama Ry. Co. v. Hopkins, 87 Fed. 505; Hopkins v. Northern Alabama Ry. Co., Id.....31 C. C. A. 94

§ 3. Foreign receiverships.

When a foreign receiver is obliged to invoke the aid of the court of another state in asserting his title to assets within its jurisdiction, such court will not, in the exercise of comity, recognize his title to the prejudice of the citizens of its own state, who have fairly acquired title to the assets, either by purchase, attachment, or other legal process, or whose claims are entitled to priority as equitable liens. But the court will make no distinction between foreign and domestic creditors when their claims are of equal validity, and it rests in the court's discretion whether the assets within its jurisdiction shall be distributed under its own direction or shall be transmitted to the primary receiver.

—Sands v. E. S. Greeley & Co., 88 Fed. 130.....31 C. C. A. 424

RECORDS.

Of mortgages, see "Mortgages," § 1.

REFERENCE.

To commissioners in admiralty, see "Admiralty," § 1.
To master in chancery, see "Equity," § 4.

REFORMATION OF INSTRUMENTS.

§ 1. Right of action and defenses.

The evidence showed that the only land owned by grantor was a tract of 250 acres in the Tierwester survey, while the field notes set out in the deed call for a tract of land of 100 acres in another survey, not then owned by grantor, and that, if the notes in the deed are reversed, they will substantially describe the 250 acres owned by the grantor; that, since the deed, the grantee and his successors have claimed and controlled the 250 acres in the Tierwester survey, while during this time the grantor or his successors have made no claim to it. *Held* sufficient to sustain a decree, in a suit brought 50 years after the deed, that such deed be reformed to cover the 250 acres in the Tierwester survey.

—Hill v. Kuhlman, 87 Fed. 498.....31 C. C. A. 87

REPLEVIN.

§ 1. Right of action and defenses.

In replevin for machinery sold by the plaintiff, with reservation of title as security for the purchase price, the rights of innocent mortgage bondholders under a mortgage executed by the vendee are available as a defense.

—Ryle v. Knowles Loom Works, 87 Fed. 976.....31 C. C. A. 340

REPUTATION.

As evidence, see "Witnesses," § 3.

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REQUESTS.

For instructions, see "Trial," § 6.

RESIDENCE.

As affecting question of taxation, see "Taxation," § 8.

RES JUDICATA.

See "Judgment," § 2.

RETROSPECTIVE LAWS.

See "Statutes," § 2.

SALES.

See, also, "Vendor and Purchaser."
Of pledged property by pledgee, see "Pledges," §§ 1, 2.
Of public lands, see "Public Lands," § 1.
Of railroads, see "Railroads," § 1.
On mortgage foreclosure, see "Mortgages," § 4.

§ 1. Conditional sales.
Where personal property is delivered under a contract of bailment, accompanied with an agreement for a future sale to the bailee on the payment of a certain price, the ownership of the bailor is preserved, and the transaction is valid, even as against the creditors of the bailee and innocent purchasers.
—Ryle v. Knowles Loom Works, 87 Fed. 976.....31 C. C. A. 340

In Pennsylvania a sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase price is paid, is void as to creditors of the vendee and innocent purchasers; and this rule applies, whatever the form of the agreement.
—Ryle v. Knowles Loom Works, 87 Fed. 976.....31 C. C. A. 340

In Pennsylvania, a reservation of title, by an instrument in the form of a lease, as security for the purchase price of personal property sold and delivered, is unavailing as against creditors and innocent purchasers; and it matters not that the lease was contemplated from the beginning, and the property delivered in pursuance of that contemplation.
—Ryle v. Knowles Loom Works, 87 Fed. 976.....31 C. C. A. 340

SALVAGE.

§ 1. Right to compensation.
Timber found drifting with the tide, on deep water, in a harbor, and out of control of the owners, is the subject of salvage.
—Whitmire v. Cobb, 88 Fed. 91.....31 C. C. A. 395

§ 2. Amount.
An award of $500 upon a salved value of $1,522.50 *held* excessive for services rendered by the first to arrive and most efficient of a number of tugs which pumped water into a burning barge; the time occupied being about 6½ hours, and there being no danger to life or property. The award should be reduced on appeal to $250.
—The Brandywine, 87 Fed. 652.....31 C. C. A. 187

Upon proof that the public custodian of lost timber, who himself was entitled to demand 75 cents per stick for timber recovered, paid regularly to salvors 50 cents per stick for timber turned over to him, the court al-

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lowed a salvor 50 cents per stick as against the owner of the timber. *Held* no abuse of discretion.
—Whitmire v. Cobb, 88 Fed. 91.....31 C. C. A. 395

SCIRE FACIAS.

To revive judgment, see "Limitation of Actions."

SEAMEN.

§ 1. Wages—Forfeiture.
Where shipping articles provide that members of the crew shall not be entitled to wages until return to the home port, their refusal, in a foreign port, to proceed with the voyage, no excuse for such refusal appearing, works a forfeiture of their right to wages.
—The H. C. Wahlberg, 87 Fed. 361; Lorentzen v. Schlehen, Id.....
31 C. C. A. 6

SET-OFF AND COUNTERCLAIM.

In action on promissory notes, see "Bills and Notes," § 1.

§ 1. Nature and grounds of remedy.
The right to set-off is wholly statutory, and under 2 Hill's Code Wash. § 806, when a party is sued by the assignee of a chose in action, he cannot plead against the assignee a set-off which he holds against the assignor unless the demand sought to be set off existed at the time of the assignment, and belonged to the party in good faith before notice of such assignment.
—Harrisburg Trust Co. v. Shufeldt, 87 Fed. 669.....31 C. C. A. 190

SETTLEMENT.

See "Account Stated."

SHIPPING.

See, also, "Collision"; "Maritime Liens"; "Salvage"; "Seamen"; "Towage"; "Wharves."

§ 1. Charters.
Notwithstanding the fact that the charterers acquiesced in certain customs of baymen while loading their ships for some time previous to a strike, this is not a waiver of their right to insist upon their abandonment of such customs if the same are unreasonable, nor is it evidence of their justness.
—Hawkhurst S. S. Co. v. Keyser, 87 Fed. 1005; Keyser v. Hawkhurst S. S. Co., Id.....31 C. C. A. 347

§ 2. Liabilities of vessels and owners in general.
By a charter party, only the freight room was hired, and the vessel remained in the control of the owner, the master and crew continuing his servants. The loading was to be done by a stevedore employed by the charterers, but under the supervision of the master, and the vessel was to furnish the use of her tackle and appliances for loading. *Held*, that the vessel was liable for an injury to one of the stevedore's employés, resulting from the use of defective appliances.
—The Elton, 83 Fed. 519; Marquest v. Grant, Id.....31 C. C. A. 496

A member of a stevedore's gang does not assume extraordinary risks which arise from the use of unsafe appliances in loading.
—The Elton, 83 Fed. 519; Marquest v. Grant, Id.....31 C. C. A. 496

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§ 3. Demurrage.

The term "strike," contained among the exceptions as to the running of lay days stipulated for in a charter party, should be accepted in its ordinary sense, as meaning that the charterers should be excused for any delay occasioned by a refusal of all the available workmen to work except charterers should pay an advance in wages made or demanded in the midst of the loading of a vessel, after the contract of the charterers and owners had been made upon the basis of wages formerly paid.

—Wood v. Keyser, 87 Fed. 1007; Keyser v. Wood, Id..31 C. C. A. 358

Days lost in putting up the gear of a vessel, preparatory to taking her cargo, being, under the terms of the charter party, a part of the duty of the merchant, should be included in the running of the lay days.

—Wood v. Keyser, 87 Fed. 1007; Keyser v. Wood, Id..31 C. C. A. 358

Where, by the custom of a port, baymen stop work upon the day of the funeral of one of their deceased members, and also where they stop work on days which are not legal holidays, but which they desire to commemorate thereby, no allowance should be made therefor out of the days stipulated as lay days, as the term "working days" includes all days except Sundays and legal holidays; and, as these days cannot be excepted under any other provision of the charter party, they should be computed in the running of lay days.

—Wood v. Keyser, 87 Fed. 1007; Keyser v. Wood, Id..31 C. C. A. 358

Where the lay days of a vessel being loaded by respondent merchants are fixed, but exceptions from the running thereof include the term "strikes," merchants should not be held liable for demurrage, even though the alleged strike was brought about by the demands of the merchants that the laborers engaged in loading the vessel should conform to certain rules and regulations which are perfectly reasonable in themselves.

—Hawkhurst S. S. Co. v. Keyser, 87 Fed. 1005; Keyser v. Hawkhurst S. S. Co., Id.....31 C. C. A. 347

SPANISH GRANTS.

See "Public Lands," § 4.

STATES.

Suit against state or state officers, see "Courts," § 1.

STATUTES.

Adoption by United States courts of state laws as rules of decisions, see "Courts," § 5.

§ 1. Subjects and titles of acts.

A constitutional provision that no law shall embrace more than one subject, which shall be expressed in its title, does not prevent the legislature from inserting in an act any provision which is germane to the general subject to which the act relates. It is only intended to prevent surreptitious legislation, and the union in the same act of incongruous matters, having no natural relation to each other, or to the general subject with which the act deals.

—City of South St. Paul v. Lamprecht Bros. Co., 88 Fed. 449..... 31 C. C. A. 585

An act revising and amending the charter of a city located on the bank of a large river is not obnoxious to a constitutional provision limiting legislative measures to one subject, merely because it authorizes the municipality, among other things, to issue bonds to defray the cost of a railroad and wagon bridge across the river.

—City of South St. Paul v. Lamprecht Bros. Co., 88 Fed. 449..... 31 C. C. A. 585

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§ 2. Construction and operation—Retroactive operation.
A statute is not to be given a retrospective effect unless it clearly and unequivocally appears that such was the legislative intent.
—Wrightman v. Boone County, 88 Fed. 435.....31 C. C. A. 570

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STOCK.

Corporate stock, see "Corporations," §§ 1, 2.
Taxation of, see "Taxation," § 4.

STOCKHOLDERS.

Of corporation, see "Corporations," §§ 3, 4.

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STREET RAILROADS.

§ 1. Regulation and operation.
In the absence of testimony showing authority from the company, the act of a street-railway conductor in causing the arrest of a former passenger immediately after ejecting him from the car for refusing to pay fare is outside the course of his employment, so that no action will lie against the company for malicious prosecution and false imprisonment.
—Lezinsky v. Metropolitan St. Ry. Co., 88 Fed. 437....31 C. C. A. 573

The action of a clerk in the claims department of a street-railway company, in endeavoring to convince a magistrate that a conductor was right in causing the arrest of a passenger after ejecting him from the car for refusal to pay fare, is not a ratification of the conductor's unauthorized action, where the clerk was merely directed by his superior to go to the police court, "and see what the matter was."
—Lezinsky v. Metropolitan St. Ry. Co., 88 Fed. 437....31 C. C. A. 573

SUBSCRIPTIONS.

To corporate stock, see "Contracts."

SURETYSHIP.

See "Principal and Surety."

SURVIVING PARTNERS.

See "Partnership."

TARIFF.

See "Customs Duties."

TAXATION.

Assessments for municipal improvements, see "Municipal Corporations," § 2.

§ 1. Constitutional requirements and restrictions.
Under the Tennessee constitution of 1870 (article 2, § 28), declaring that all property shall be taxed "according to its value," to be ascertained as the legislature shall direct, "so that taxes shall be equal and uniform throughout the state," when it is the uniform practice in the various counties of the state to assess real property at not exceeding 75 per cent. of its true value, an assessment upon railroad property at its full value violates the uniformity of taxation which is the main purpose of the constitutional provision, and will be enjoined, although this involves a violation of the letter of the state statute passed pursuant to the constitution, which requires all property to be assessed at its full value.
—Taylor v. Louisville & N. R. Co., 88 Fed. 350.....31 C. C. A. 537

§ 2. Liability of persons and property.
Until a Spanish grant has been segregated from the public domain by survey properly approved, it is not subject to taxation by state authority, and a sale thereof for such taxes is void.
—Robertson v. Sewell, 87 Fed. 536; Sewell v. Robertson, Id..... 31 C. C. A. 107

§ 3. Place of taxation.
It is within the power of a state to tax money and credits of a nonresident when the money is invested, the debt contracted, and the investment controlled by a resident agent of the owner, having the evidences of the debt in his possession.
—Walker v. Jack, 88 Fed. 576.....31 C. C. A. 462

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Under Rev. St. Ohio, §§ 2731, 2734, 2735, moneys and credits owned by a nonresident of the state, and which are *held*, invested, and controlled for him by an agent residing in the state, are made subject to taxation. 79 Fed. 138, reversed.

—Walker v. Jack, 88 Fed. 576.....31 C. C. A. 462

§ 4. Levy and assessment—Mode of assessment of corporate stock, property, or receipts.

In valuing railroad property for purposes of taxation, the market value of the bonds and stock of the corporation owning it may properly be considered, even if, under the statute, each line of road is to be valued by itself, and not as part of a system.

—Taylor v. Louisville & N. R. Co., 88 Fed. 350.....31 C. C. A. 537

Act Tenn. April 5, 1897, in relation to the taxation of railroad, telephone, and telegraph property, which required the board of assessors therein provided for to complete their assessment on or before September 1st of that year, annulled by implication, and superseded, the assessment previously made for the same year by the old board of assessors under the act of 1895.

—Taylor v. Louisville & N. R. Co., 88 Fed. 350.....31 C. C. A. 537

§ 5. —— Equalization of assessments.

Under the Tennessee railroad assessment act of 1897, neither the board of tax assessors nor the board of equalization are charged with the duty of equalizing the taxable value of real estate with that of railroad property.

—Taylor v. Louisville & N. R. Co., 88 Fed. 350.....31 C. C. A. 537

§ 6. —— Correction, or setting aside assessments.

Equity will not enjoin an assessment of property at its full value, on the ground of inequality resulting from the assessment of other property at less than its full value, unless it appears that the assessing officers, whose acts of undervaluation create the unjust burden, intentionally and habitually violate the law by assessing property at less than its true value; but it need not affirmatively appear that they did so with intent to injure complainant and his class of taxpayers.

—Taylor v. Louisville & N. R. Co., 88 Fed. 350.....31 C. C. A. 537

§ 7. Collection and enforcement against persons or personal property —Remedies for wrongful enforcement.

A suit to enjoin the collection of a tax will not be entertained (at least, in the federal courts) when the sole ground relied on is that the tax is illegal or excessive. It must appear in addition that the circumstances make the wrong about to be inflicted of such a peculiar character that the remedies at law are inadequate, and so bring the case under some recognized head of equity jurisdiction.

—Taylor v. Louisville & N. R. Co., 88 Fed. 350.....31 C. C. A. 537

It would seem that the fact that there is a remedy by certiorari in the state courts, which would prevent a multiplicity of suits in a case of illegal taxation, does not affect the jurisdiction of a federal court in equity to enjoin the enforcement of the tax in cases of diverse citizenship, as the remedy by certiorari is not available in the federal courts, whose powers to issue the writ are limited to cases in which it is necessary for the exercise of their jurisdiction.

—Taylor v. Louisville & N. R. Co., 88 Fed. 350.....31 C. C. A. 537

In any event, certiorari is not an adequate remedy where the fact upon which the claim for relief is based can only be made to appear de hors the record.

—Taylor v. Louisville & N. R. Co., 88 Fed. 350.....31 C. C. A. 537

A court whose receiver is in charge of a railroad may properly allow an injunction pendente lite forbidding the state taxing officers to collect disputed taxes levied against a part of the railroad property.

—Clark v. McGhee, 87 Fed. 789.....31 C. C. A. 321

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TOWAGE.

Collisions with vessels in tow, see "Collision," § 2.

§ 1. Relation and duties of tug to tow in general.

When a tug takes in tow a schooner, having her own officers and crew on board, who take control and management of the fastening of the tow-line to their vessel, they are bound to see that it is securely fastened; and the tug is not responsible for any failure in this respect.

—Pederson v. John D. Spreckles & Bros. Co., 87 Fed. 938..... 31 C. C. A. 308

A tug engaged in towing is not bound to exercise the highest possible degree of skill and care. Her duty is to use reasonable care and skill, and she has a right to expect corresponding care and skill on the part of the tow, when the latter is in charge of her own officers and crew.

—Pederson v. John D. Spreckles & Bros. Co., 87 Fed. 938..... 31 C. C. A. 308

§ 2. Loss of or injury to tow—Negligence or fault of tug.

On the preponderance of the evidence, *held*, that in towing a schooner it is not good seamanship, when the line is passed through the breast chock, to make it fast to the pawl bitt, as this brings it at such an angle as to put a great and uneven pressure on the chock, and a heavy strain on the line; that, if passed through the breast chock, the line should be fastened to the windlass bitt; and that the best method is to have as straight a lead as possible.

—Pederson v. John D. Spreckles & Bros. Co., 87 Fed. 938..... 31 C. C. A. 308

In towing a schooner about 90 feet in length and of some 87 tons, gross, with a 5-inch Manilla line, in a smooth bay, 6 to 7 knots an hour is not excessive or dangerous speed.

—Pederson v. John D. Spreckles & Bros. Co., 87 Fed. 938..... 31 C. C. A. 308

§ 3. Injuries to third persons.

A tug, towing a schooner manned by her own officers and crew, *held* not liable for personal injuries occasioned to the schooner's mate by the breaking of the breast chock, through which the line was run, where the accident was due to bad seamanship of the mate, in causing the line to be run through the breast chock and fastened to the pawl bitt, instead of to the windlass bitt.

—Pederson v. John D. Spreckles & Bros. Co., 87 Fed. 938..... 31 C. C. A. 308

TRADE-MARKS AND TRADE-NAMES.

§ 1. Marks and names subjects of ownership.

No one has, or can acquire, the exclusive right to use the name "Pocahontas," as descriptive of either the locality or character of coal mined in what is known as the "Great Pocahontas Coal Field of Virginia and West Virginia," but all producers of coal in that section have the right to so use it in common, as the extensive product of that region has become widely known as "Pocahontas Coal."

—Coffman v. Castner, 87 Fed. 457.....31 C. C. A. 55

TRESPASS.

Ejection of trespassers, see "Carriers," § 2.

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TRIAL.

See, also, "Witnesses."
Criminal prosecutions, see "Criminal Law," § 2.
In admiralty, see "Admiralty," § 1.
In equity, see "Equity," § 3.

§ 1. Reception of evidence.
It is within the discretion of a trial court to call attention to an omission of proof after plaintiff has formally closed his case, and on request to permit the omission to then be supplied.
—Hart v. Bowen, 86 Fed. 877.....31 C. C. A. 31

§ 2. Arguments and conduct of counsel.
The court may properly direct counsel to desist from discussing to the jury immaterial evidence that has been ruled out.
—Southern Ry. Co. v. Shaw, 86 Fed. 865.....31 C. C. A. 70

§ 3. Instructions to jury—Province of court and jury in general.
The testimony of a party on a material issue, though uncontradicted, should be submitted to the jury if his adversary so requests.
—Sigua Iron Co. v. Greene, 88 Fed. 207.....31 C. C. A. 477

When there is a variance between the testimony of a witness and statements made by him in letters at the time of the transaction in question, and the letters are in evidence, it is error to instruct that greater weight must be given to the testimony than to the statements in the letters. It is for the jury to say which statement they will accept.
—Mutual Life Ins. Co. v. Logan, 87 Fed. 637.....31 C. C. A. 172

It is error for the court to submit the evidence and theory of one party prominently and fully to the jury, and not call their attention to the main points of the opposite party's case.
—Weiss v. Bethlehem Iron Co., 88 Fed. 23.....31 C. C. A. 363

§ 4. —— Necessity and subject-matter.
Reversible error exists if the general effect of a charge tends to withdraw from the consideration of the jury material evidence, or fails to present with sufficient distinctness a material fact which may have a controlling effect.
—Weiss v. Bethlehem Iron Co., 88 Fed. 23.....31 C. C. A. 363

§ 5. —— Applicability to pleadings and evidence.
Instructions which, taken as a whole, are calculated to mislead the jury as to the character of the evidence necessary to prove the issue on one side, are erroneous.
—Weiss v. Bethlehem Iron Co., 88 Fed. 23.....31 C. C. A. 363

§ 6. —— Requests or prayers.
When the law in regard to the measure of damages for the killing of a child is correctly given in the general charge, it is not error to refuse a more detailed special instruction covering the same ground.
—Baltimore & O. R. Co. v. Hellenthal, 88 Fed. 116....31 C. C. A. 414

A party, by moving for the direction of a verdict, does not thereby waive any right he may have to go to the jury on questions of fact, and where both parties at the close of the evidence moved for the direction of a verdict, and both motions were denied, but the court, over the exception of one party, submitted a single issue of fact to the jury, such party is not estopped by his motion from assigning as error the failure of the court to submit the case generally.
—Sigua Iron Co. v. Greene, 88 Fed. 207.....31 C. C. A. 477

Requests to charge, which do not fairly state the testimony, and which sum up the evidence for the defendant without stating with anything like judicial fairness what it tends to prove, are properly denied.
—Southern Ry. Co. v. Shaw, 86 Fed. 865.....31 C. C. A. 70

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The court is not bound to notice oral requests to charge, made by counsel during his argument to the jury.
—Southern Ry. Co. v. Shaw, 86 Fed. 865.....31 C. C. A. 70

It is not error to refuse instructions asked, based upon general legal propositions, but not upon any evidence tending to show that such propositions are applicable to the facts of the case.
—Hart v. Bowen, 86 Fed. 877.....31 C. C. A. 31

TRUSTEE PROCESS.

See "Garnishment."

UNITED STATES.

Forging accounts, see "Forgery."
Public lands, see "Public Lands."

§ 1. Actions.
Under the act of March 3, 1887, providing for the bringing of suits against the United States, which requires the court to file an opinion setting forth the specific findings of fact, etc., such findings must exhibit exactly the services for which compensation is asked; and, in a suit by a United States commissioner to recover for fees, a finding that he has rendered services as follows: "Charges for per diems for taking bail under capias, etc., $160.00,"—is insufficient, because it cannot be inferred therefrom what the charges are for.
—United States v. Stratton, 88 Fed. 54.....31 C. C. A. 384

A petition filed under the act of March 3, 1887, must, as required by section 5, contain a succinct statement of the facts on which the claim is based. And, in a petition by a United States commissioner to recover for fees, general statements of items—such as "Per diems for taking bail," "Charges for per diems in certain cases," "Charges of all fees in case v. Holloway," etc.—are insufficient.
—United States v. Stratton, 88 Fed. 54.....31 C. C. A. 384

USURY.

§ 1. Usurious contracts and transactions—Nature and validity.
Complainants, husband and wife, consulted their attorney at Memphis, Tenn., about securing a loan on Mississippi real estate. He advised them to visit the office of a loan company at Vicksburg, Miss., with him, which the husband did. A bargain was struck, and papers drawn, which were sent to Memphis for the wife's signature. The notes were payable in New York, and the money was sent from Vicksburg to Memphis to complainants. The attorney received a commission on loans from the company. *Held*, that the contract was a Mississippi contract, to be construed by the laws of Mississippi.
—Glover v. Equitable Mortg. Co. of Kansas City, 87 Fed. 518.....
31 C. C. A. 105

Provision in a deed of trust for the payment of solicitor's fees on default in no way affects the rate of interest thereon.
—Glover v. Equitable Mortg. Co. of Kansas City, 87 Fed. 518.....
31 C. C. A. 105

Provisions in a trust deed giving the mortgagee the right to declare the principal due in case of taxation by the state of the deed or debt is not a means of evading the usury law.
—Glover v. Equitable Mortg. Co. of Kansas City, 87 Fed. 518.....
31 C. C. A. 105

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VENDOR AND PURCHASER.

See, also, "Sales."

Right of purchaser to compensation for land taken by railroad, see "Eminent Domain," § 1.

§ 1. Construction and operation of contract.

A contract under seal, by which one party agrees to sell and another agrees to buy certain lands and other property, which provides for delivery of the property and payment therefor, and the deposit of deeds in escrow for delivery upon completion of the payments, is a contract of sale, and not a contract for sale.

—Badger Silver Min. Co. v. Drake, 88 Fed. 48.....31 C. C. A. 378

§ 2. Rights and liabilities of parties—Bona fide purchasers.

A bona fide purchaser for value, without notice, of a tract of land, part of which has been conveyed to another by a deed the record whereof has been destroyed, and not replaced as provided by the statute, acquires a good title; but where, on subsequently receiving notice of the prior deed, he sells the land, and conveys it by a deed of special warranty, containing a reservation of the part conveyed by such previous deed, thus showing his waiver of previous notice, this protects the title of the grantees under the previous deed, so that his executors would have no power over the part conveyed by it.

—Rice v. P. J. Willis & Bro., 87 Fed. 626; P. J. Willis & Bro. v. Oakes, Id.....31 C. C. A. 154

VERDICT.

In criminal cases, see "Criminal Law," § 2.

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WARRANT.

Orders for payment from public funds, see "Municipal Corporations," § 5.

WATERS AND WATER COURSES.

See "Levees."

WHARVES.

§ 1. Franchises and privileges.

A channel and dock company organized under Sayles' Ann. St. (Tex.) 1897, §§ 721, 722, and authorized to construct a channel "across, along, through, or upon" certain waters within the jurisdiction of the states, is not restricted to a route through such waters, but may construct its channel along the borders of the same.

—Davis v. Port Arthur Channel & Dock Co., 87 Fed. 512.....31 C. C. A. 99

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WITNESSES.

See, also, "Evidence."
Opinions, see "Evidence," § 4.

§ 1. Production of documents.

An internal revenue collector is not justified in refusing to produce, in obedience to a subpœna duces tecum issued by a state court, the application or return made by a person who desires to pay the tax imposed by the statutes of the United States upon persons engaging in the retail liquor business either by the nature of such documents or by alleged instructions from the commissioner of internal revenue not to produce such papers for use in evidence in the state courts.

—In re Hirsch, 87 Fed. 1005.....31 C. C. A. 350

§ 2. Examination—Cross-examination and re-examination.

It being customary to allow considerable latitude in the manner in which witnesses shall be called for examination, a judgment will not be reversed merely because a witness, in rebuttal, after the close of defendant's case, was allowed to testify to new matters.

—Yazoo & M. V. R. Co. v. Wagner, 87 Fed. 855.....31 C. C. A. 261

A witness may not be cross-examined upon a subject concerning which he has not testified in chief, unless such cross-examination is in the form which lays a proper foundation for impeachment.

—Saffer v. United States, 87 Fed. 329.....31 C. C. A. 1

When a witness is cross-examined on a matter collateral to the issue, his answer cannot be subsequently contradicted by the party who put the questions.

—Saffer v. United States, 87 Fed. 329.....31 C. C. A. 1

§ 3. Corroboration—Character of witness.

In general, where no attempt has been made to impeach the defendant's testimony, he may not add to the weight of his evidence by evidence of his general reputation for truthfulness.

—Spurr v. United States, 87 Fed. 701.....31 C. C. A. 202

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